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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 276

GEORGE COUPPER GIBBS, INDIVIDUALLY AND AS  
ATTORNEY GENERAL OF THE STATE OF FLOR-  
IDA, ET AL, APPELLANTS,

VS.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT  
OF THE AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF FLORIDA

FILED AUGUST 15, 1933.



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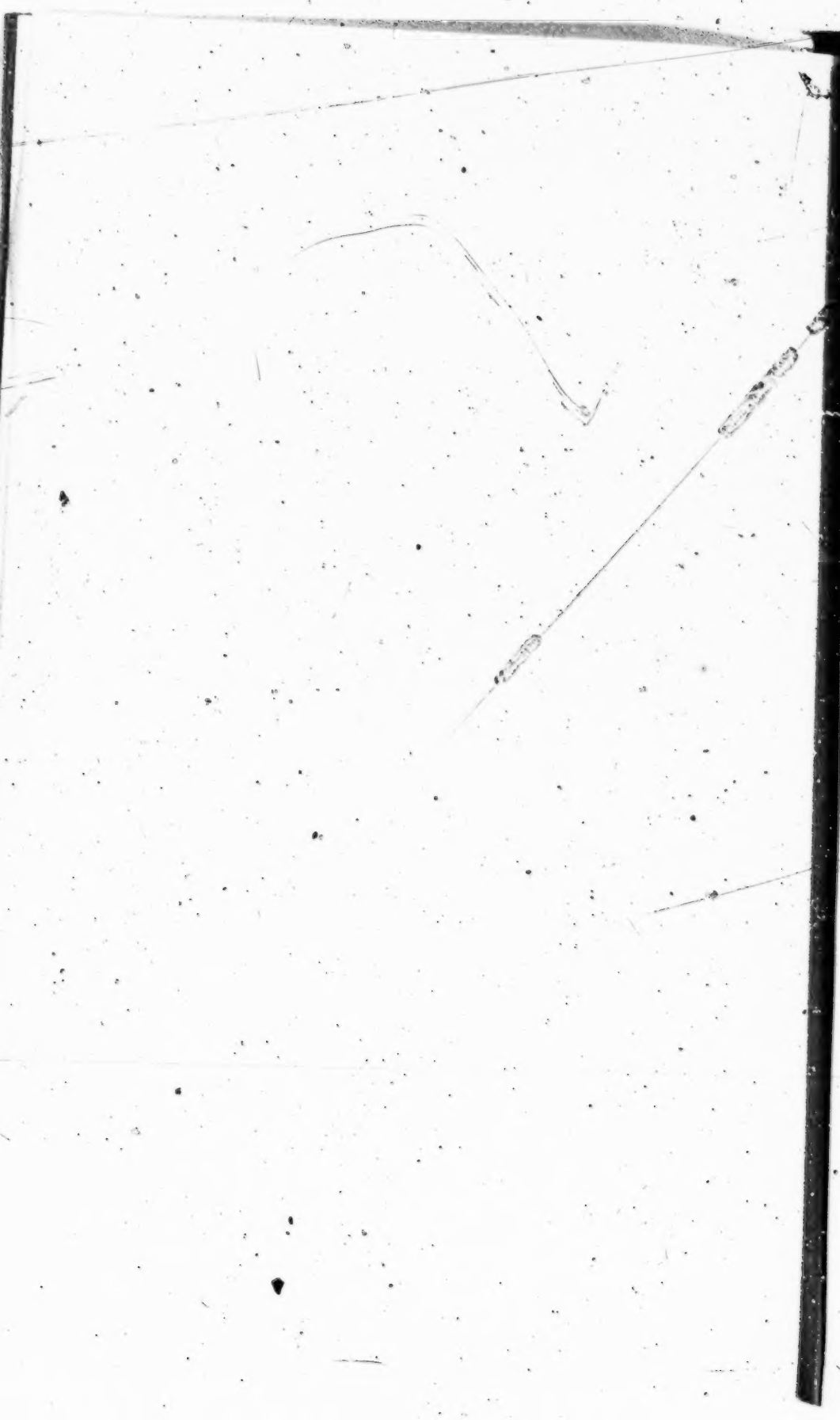
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[fol. 1]

**IN UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF FLORIDA, GAINSVILLE DIVISION**

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

CARY D. LANDIS, Individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., Individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., Individually, and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, Individually, and as State Attorney for the Third Judicial Circuit of Florida; William A. Hallöwes, III, Individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, Individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, Individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, Individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. Adkins, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, Individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, Individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, Individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Roy D. Stubbs, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, Individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "John Doe" and "Richard Roe", Defendants

**BILL OF COMPLAINT—Filed February 7, 1938**

Complainants, suing on behalf of themselves and others similarly situated bring this Bill of Complaint against the aforementioned defendants, and allege as follows:

1. The Complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the "Society"), at all times hereinafter [fol. 2] mentioned, was and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Florida, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do.

2. Complainant, Gene Buck is President of said Society; because said membership, as is above indicated, is exceedingly numerous and it would be impracticable to join all the members of said Society as parties plaintiff, and as the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by Gene Buck as President, for and on behalf of said Society, as well as in his own individual right.

3. Complainant, Carl Fischer, Inc., is a corporation, duly organized and existing under and by virtue of laws of the State of New York, having its principal place of business in the City of New York in said State; complainant G. Schirmer, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, [fol. 3] having its principal place of business in the City of New York in said State; complainant, Irving Berlin, Inc., is



a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; all of said last mentioned complainants have been for upwards of twenty-five years and are presently engaged in the business of publishing musical compositions in the State of New York and elsewhere, and are hereinafter for brevity's sake referred to as "Publishers".

4. Complainant, Gene Buck, for upwards of twenty years has been and now is an author of lyrics of musical compositions; complainant, Deems Taylor, for upwards of fifteen years has been and now is a composer of musical and dramatico-musical works; complainant, Oley Speaks, for upwards of fifteen years has been and now is a composer of musical compositions; complainant, William J. Hill, for upwards of five years has been and now is a composer of musical compositions; complainant, Anne Paul Nevin, is the widow of Ethelbert Nevin, who was for more than twenty years a composer of musical compositions, and who departed this life in 1901; complainant, Ella Herbert Bartlett, is the daughter of Victor Herbert, who was for over twenty years a composer and who departed this life in the year 1924; complainant, Jane Sousa, is the widow of John Philip Sousa, who was for more than thirty years a composer and who departed this life in the year 1932, having been a member of the Society for many years. All of the complainants in this paragraph mentioned are citizens of the United [fol. 4] States and all are residents and citizens of the State of New York, and of the Southern District of New York, with the exception of Buck and Sousa, who are residents of the Eastern District of New York, and Nevin, who is a resident and citizen of the State of Maine.

5. Upon information and belief, the defendant, Cary D. Landis, is the duly elected, appointed, qualified and acting Attorney General of said State; the defendant, E. Dixie Beggs, Jr., is the duly elected, appointed, qualified and acting State Attorney for the First Judicial Circuit in said State; the defendant, O. C. Parker, Jr., is the duly elected, appointed, qualified and acting State Attorney for the Second Judicial Circuit in said State; the defendant, A. K. Black, is the duly elected, appointed, qualified and acting State Attorney for the Third Judicial Circuit in said State; the defendant William A. Hallows, III is the duly elected,

appointed, qualified and acting State Attorney for the Fourth Judicial Circuit in said State; the defendant, J. W. Hunter, is the duly elected, appointed, qualified and acting State Attorney for the Fifth Judicial Circuit in said State; the defendant, Chester B. McMullen, is the duly elected, appointed, qualified and acting State Attorney for the Sixth Judicial Circuit in said State; the defendant, Murray Sams, is the duly elected, appointed, qualified and acting State Attorney for the Seventh Judicial Circuit in said State; the defendant, J. C. Adkins, is the duly elected, appointed, qualified and acting State Attorney for the Eighth Judicial Circuit in said State; the defendant, Murray W. Overstreet, is the duly elected, appointed, qualified and acting State Attorney for the Ninth Judicial Circuit in said State; the defendant, L. Grady Burton, is the duly elected, appointed, qualified and acting State Attorney for the Tenth [fol. 5] Judicial Circuit in said State; the defendant, G. A. Worley, is the duly elected, appointed, qualified and acting State Attorney for the Eleventh Judicial Circuit in said State; the defendant, Roy D. Stubbs, is the duly elected, appointed, qualified and acting State Attorney for the Twelfth Judicial Circuit in said State; the defendant, J. Rex Farrior, is the duly elected, appointed, qualified and acting State Attorney for the Thirteenth Judicial Circuit in said State; defendant John H. Carter, Jr., is the duly elected, appointed, qualified and acting State Attorney for the Fourteenth Judicial Circuit in said State; defendant Louis F. Maire is the duly elected, appointed, qualified and acting State Attorney for the Fifteenth Judicial Circuit in said State; and the defendants, "John Doe" and "Richard Roe", are the duly elected, appointed, qualified and acting officials of the State of Florida, whose names are at present unknown to complainants, who are also charged with the enforcement of Senate Bill No. 679, enacted by the Legislature of Florida, and signed by the Governor of that State on June 9th, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute"), and each of said defendants is a citizen and resident of the State of Florida.

6. The value of the matter in dispute herein between complainants and defendants is in excess of the sum of \$3,000.00, exclusive of interest and costs.

7. This action is a suit in equity arising under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of the said Statute of certain rights, privileges and [fol. 6] immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of Florida, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted musical compositions, which has been vested in the complainant Society for a limited period, as hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article 1, Section 8 of the Constitution of the United States, and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078 U. S. Code, Title 17); to repress and prevent the deprivation of such rights without due process of law and without the equal protection of the laws, and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of the said State Statute as an ex post facto law, and to repress and prevent the interference by the State of Florida with the federal judicial power and the privileges of complainants as citizens of the United States by denying the complainants the right of access to the Federal Courts; to repress and prevent a compulsory, irrevocable grant of special privileges to the users of complainants' copyrighted music in the State of Florida in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement [fol. 7] of said State Statute as a special law granting to corporations, associations or individuals a special privilege and retroactive in its operations; and this suit, among other things, involves the question as to whether or not each of the complainants may combine with a substantial number of other persons, corporations or associations for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Florida and without doing any act within the State of



Florida; whether or not the complainants have the right to issue to citizens of Florida licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants, apart from the sale of copies of such compositions in the form of sheet music; whether the complainants have the right to act collectively in combination with a substantial number of persons, corporations or associations for the purpose of granting blanket licenses at fixed fees for the public performance for profit of the complainants' copyrighted musical compositions to users located within the State of Florida; whether the State of Florida has the right to require and compel complainants to fix a price for their copyrighted musical compositions for all uses and purposes and to affix such price upon the musical composition in whatever form the same may be published, printed, manufactured, or otherwise prepared for use or rendition; whether the State of Florida has the right to declare void and unenforceable all existing contracts, agreements, licenses and arrangements made by complainants with or granted to users in the State of Florida; whether the State of Florida may impose a [fol. 8] penalty upon complainants for collecting or attempting to collect the moneys due them under said existing contracts; whether the State of Florida has the right to grant to owners, lessees, operators or managers of radio broadcasting, radio receiving or radio rebroadcasting stations within that State, the right to receive, broadcast and rebroadcast complainants' copyrighted musical compositions without the payment to complainants of any license fee or other compensation for such use; whether the State of Florida has the right to grant to owners, lessees, operators or managers of any theatre, moving picture house or similar place for amusement and public performance within Florida, the right to receive, use and render or cause to be received, used or rendered the copyrighted musical compositions of the combinations declared unlawful by said Statute, including the musical compositions of complainants, without the payment to complainants of any license fee or other compensation for such use; whether the State of Florida has the right to prevent the complainants from suing users in Florida for infringement of their respective copyrighted musical compositions or for loss or damage within Florida for the use or rendition, including the public performance for profit, of their respective copyrighted musi-

cal compositions originating or emanating from outside the State of Florida and performed, rendered or otherwise used within said State; whether the State of Florida has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Florida, by providing that any representative of any combination declared to be unlawful under said State Statute shall be deemed an official representative and agent of such combination and shall [fol. 9] be construed to be doing business within Florida, and that service of any process may be had against complainants and others similarly situated by service upon said representative or the agent of any such representative, with the same force and effect as if service were made upon the duly elected officer or acting agent or other official representative; whether the State of Florida may prevent complainants from engaging an agent in said State, by enacting that any such agent shall be subject to the penal provisions of the said State Statute; whether the State of Florida may dissolve the Society, which is organized under the laws of the State of New York and has its principal place of business therein, by an action brought within the State of Florida for committing any of the acts specified in said Statute to be in violation thereof upon service secured by service upon any representative that the Society may have within said State; whether the State of Florida may require the complainants and others similarly situated under penalty of being held in contempt of Court and being fined \$100.00 for every day that they shall fail or refuse to furnish such documents, to file with the Clerk of the Court in which any civil or criminal action or proceeding is pending against complainants, or others similarly situated, exact copies of all documentary evidence, records or data in the possession or under the control of complainants and others similarly situated (being defendants in such suit or proceeding) pertaining to the issues in said action; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including, fine, imprisonment, [fol. 10] contempt and penalties therein provided for, and whether or not the defendants, in threatening to enforce the provisions of said State Statute against complainants are not depriving the complainants of their property and their right to liberty without due process of law, and whether they are not denying the complainants the equal protection

of the laws; whether the State of Florida may compel complainants and others similarly situated to be witnesses against themselves and be subjected to unlawful search and seizure, and whether the State of Florida may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies, who have authorized the Society to grant blanket licenses in the United States on their behalf, which conditions are not embraced in, but are in conflict with existing Treaties, Presidential Proclamations, and the Copyright Act of the United States.

This suit is brought to repress and prevent defendants from proceeding under and by virtue of the provisions of said State Statute, and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment and penalties under the color of said State Statute.

8. The Publishers, in furtherance of their business of publishing musical compositions, acquired from writers and composers the right to publish musical compositions written and composed by such writers and composers, respectively, either by outright purchases of such rights or upon a royalty basis and will in the ordinary and usual course of their business continue to acquire similar rights in many thousands of musical compositions; in the great majority of [fol. 11] cases, complainants acquired and will in the ordinary and usual course of their business continue to acquire from such writers and composers the right to secure copyright in the compositions purchased by Publishers; when such compositions are published by Publishers, two of the best copies thereof are deposited with the Register of Copyrights at Washington, D. C., and the required fee paid to him with a claim for copyright registration, and said compositions are always registered for copyright with the Register of Copyrights in Washington, D. C., pursuant to the provisions of the Copyright Act of 1909 (hereinafter referred to as the "Copyright Act"), and on each and every one of the compositions published by publishers there appears upon the first page of music at the foot thereof, the copyright notice prescribed by said Copyright Act; each of the Publishers in the course of its many years of conducting its respective business, has registered many thousands of compositions with the Register of Copyrights, and each



has secured for its respective corporation the ownership of the copyright in many thousands of musical compositions; in the music business or trade the totality of copyrights of a particular publisher is known as its "catalogue"; the great majority of each Publisher's respective catalogue is likewise copyrighted in foreign countries, as well, and copyright protection is obtained by said publishers for their catalogues in almost every civilized country of the world; none of the copyrights owned by the complainants has a situs within the State of Florida; that each publisher's business is extensive, and that the value of the copyrights owned by each publisher is in excess of \$1,000,000.00; old copyrights expire currently and are renewed, sometimes by the publisher and sometimes by the writer and composer, or [fol. 12] such others as may be entitled to renewal under the Copyright Act, and new compositions are constantly being registered; the rights in the copyrights are manifold and many of them are and have been granted by the Publishers to others separate and apart from other rights and are subdivided as to locality, extent and term; in many cases certain rights are reserved to the author or composer and disposition thereof is not within the control or knowledge of the publisher complainant, and is not ascertainable.

9. Each of the publishers has secured copyright registration in many thousands of musical compositions of which copyrights each of said publishers is respectively the proprietor; said copyrights have been secured in manner similar to that described hereinabove, and with respect to each of said copyrights, the publishers have respectively obtained copyright cards, and all such copyrights are on file in the office of the Register of Copyrights in Washington, D. C., as prescribed by Statute, and copies of such cards are not annexed hereto in order to avoid unduly encumbering this complaint, but reference is made hereto and the same are incorporated herein, and copies of said cards will be produced upon the trial of this case, if necessary.

10. Complainant Gene Buck wrote the lyrics of many musical compositions, for over twenty years last past, and from time to time he entered into contracts with various music publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works, as required by the Copyright Act; said copyrights expire by limitation

of time at various dates in the future, and complainant Buck is advised and verily believes, that he is entitled to secure [fol. 13] a renewal of each such copyright for an additional period of twenty-eight years, in his own name and on his own behalf, in each of said works; in such renewals of copyright, complainant Buck will have all the rights that vested in the proprietor of the original copyrights; among such works are the following: "Tulip Time", "Hello Frisco", "Garden of My Dreams", "No Foolin'", "The Love Boat", "Florida, The Moon and You"; for over fifteen years, complainant Buck wrote the words and lyrics for the Florenz Ziegfeld Follies, as well as the words and lyrics of other musical shows produced with great success; Buck's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000.

11. Complainant Deems Taylor composed the music for two musical compositions entitled "Banks O' Doon" and "Captain Stratton's Fancy", in 1923, and entered into a contract for the publication of said compositions with J. Fischer & Bro., a music publisher; a copy of said contract is hereto annexed and marked Exhibit "A"; said publisher secured copyright of said compositions by publication and deposit of the work, as required by the Copyright Act, in and about the year 1923, and said copyrights expire by limitation of time in the year 1951, and complainant Taylor is advised and verily believes, that he is entitled to secure a renewal of said copyrights for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyrights, complainant Taylor will have all the rights vested in the proprietor of the original copyrights; the complainant Taylor has composed the music for a great many other works, among them "The King's [fol. 14] Henchman", "Peter Ibbetson" and "Through A Looking Glass Suite"; "Peter Ibbetson" has been successfully produced at the Metropolitan Opera House in the City of New York; Taylor's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000. Under said contract, Exhibit "A", and other contracts between complainant Taylor and his publisher, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by

his publisher averaging about 10% thereof. Under the contract between complainant Taylor and the Society, complainant Taylor is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Taylor receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if said Statute be enforced, complainant Taylor will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions; and said Taylor will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

12. Complainant Oley Speaks composed the music for many musical compositions and entered into numerous contracts for the publication of said compositions with the complainant G. Schirmer, Inc., a music publisher; said publisher secured copyrights in said compositions by publication, deposit and registration of the works, as required by the [fol. 15] Copyright Act, and said copyrights will expire by limitation of time at various dates in the future, twenty-eight years from the respective dates of registration of said works; and complainant Speaks is advised and verily believes that he is entitled to secure renewals of said copyrights for an additional period of twenty-eight years respectively, in each one in his own name and on his own behalf; in such renewals of copyright complainant Speaks will have all the rights that vested in the proprietor of the original copyrights; among the works composed by Speaks are the following: "Sylvia", "Road to Mandalay" and "Morning"; Speaks' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000. Under the contracts between complainant Speaks and his publishers, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Speaks and the Society, complainant Speaks is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him;

in other words, complainant Speaks receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Speaks will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, and said Speaks will have no [fol. 16] right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

13. Complainant Hill composes music, and he has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., a music publisher who has secured copyrights of said compositions by publication, deposit and registration of such works as required by the Copyright Act, and said copyrights expire by limitation of time at various dates in the future, twenty-eight years from the date of registration of such respective works, and the complainant Hill is advised and verily believes that he is entitled to secure renewals of said copyright for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyright complainant Hill will have all the rights that vested in the proprietor of the original copyrights; the complainant Hill has composed the music for a great many works, among them "The Last Roundup", "Chapel in the Moonlight", "The Old Spinning Wheel", "Lights Out", "Wagon Wheels", "Empty Saddles", "The Glory of Love" and "Timber"; Hill's right to collect royalties from his works, as aforementioned; as well as his right to secure renewals of copyright therein are worth in excess of \$100,000. Under the contracts between complainant Hill and his publishers, said complainant is entitled to receive a certain royalty on every copy of sheet music sold by his publisher averaging about one and one-half cents on each such sale. Under the contract between complainant Hill and the Society, com-[fol. 17] plainant Hill is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Hill receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, com-



plainant Hill will be entitled to receive only an average of 6% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, since such sheets of music are ordinarily sold for about twenty-five cents; and said Hill will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

14. Complainant Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed, among others, the following musical compositions which were duly published and copyrighted: "The Rosary", "Mighty Lak a Rose", "Venetian Suite" and "Narcissus," and she has obtained renewals of some of said compositions in her own name, and is advised and verily believes that she will be entitled under the copyright act to obtain renewals of all of such compositions as and when the original terms thereof expire, during her lifetime; Ella Herbert Bartlett is the daughter of Victor Herbert, the foremost composer in America, who wrote and composed, among others, the following works, all of which were duly registered for copyright: "Kiss Me Again", "Natoma", "Sweet Mystery of Life", "I'm Falling in [fol. 18] Love With Someone", "Mlle. Modiste", "Red Mill", "Naughty Marietta", "Irish Fantasy" and "Pan Americana"; she has renewed some of the works on which the original term of copyright has expired, and is advised and believes that she will be entitled to renew the other works as and when they expire; Jane Sousa is the widow of John Phillip Sousa, who wrote and composed a great many compositions, and who was known as the "March King"; among his compositions are the following: "Stars & Stripes Forever", "Adeste Fidelis", "Washington Post March" and "El Capitan"; said compositions were duly registered for copyright, and said complainant Jane Sousa has renewed some of said compositions, and is advised and believes that she will have the right to renew the other works as and when they expire; the rights, which the complainants mention in this paragraph have, in the renewal of the works written and composed respectively by the husbands and father of said complainants, are of great value and are worth in excess of \$100,000. with respect to each of said complainants. Under their respective contracts with their publishers, said complainants are entitled to receive a certain percentage of the market or retail price on every copy

of sheet music sold by their publishers averaging about 10% thereof. Under the respective contracts between said complainants and the Society, said complainants are entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to them; in other words, said complainants receive approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of their copyrighted musical compositions; if the [fol. 19] said Statute be enforced, said complainants will be entitled to receive only an average of 10% of the moneys paid to their respective publishers by users in Florida publicly performing for profit their respective copyrighted musical compositions, and said complainants will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

15. Prior to 1917, none of complainants, nor the respective husbands and father of complainants mentioned in the next preceding paragraph, received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; although the copyright Statute gave to the complainants the exclusive right to publicly perform for profit their respective musical compositions, users of musical compositions throughout the country refused to recognize such exclusive rights in complainants, and persistently and stubbornly refused to pay any royalties for such public performance for profit, but, on the contrary, users of music throughout the country publicly performed for profit the musical compositions owned, written and composed by complainants respectively, without payment of any royalties; complainants and others similarly situated were unable to enforce their exclusive rights in the public performance for profit of their compositions; individually they had no means of enforcing such rights; they could not employ investigators throughout the country to detect infringement because such public performances for profit were fugitive, fleeting and ephemeral, and no record was made by users [fol. 20] of such performances; complainants had no effective means of employing lawyers throughout the United States to bring infringement suits against users for the wrongful public performance for profit of their musical compositions; and complainants and others similarly situated

were helpless to enforce the rights granted to them by the Copyright Act; those of the users of music who might be willing or inclined to pay for the public performance for profit of the compositions of complainants and those similarly situated, were unable to do so because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; under such circumstances it was impossible to get in touch with the individual owners of the particular musical compositions, many of whom were scattered throughout the world; the users of music, consisting primarily of hotel owners, innkeepers, cabaret and dance hall proprietors and motion picture exhibitors, were organized into very powerful trade associations who employed counsel to defend such users against claims of infringement for the unauthorized performance of public performance of musical works of complainants, and others similarly situated, and such associations of users even offered to defend infringers who were not members of their respective associations.

16. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Perlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, [fol. 21] Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Whitmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a voluntary unincorporated non-profit association under the laws of the State of New York, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not and does not deal in any commodity, did not and does not deal in any sheet music, exercised and exercises no function with respect to mechanical rights of reproduction, and was and is limited solely as aforesaid to the right of public performance for profit; said Society has functioned continuously since said date; from its very commencement it encountered tremendous opposition on the part of organized groups of users of music throughout the country; one of the functions of the Society was to detect infringements of the right of public performance for profit of its members and to insti-

tute suits on behalf of its members for such infringements; it also licensed establishments throughout the country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees; the organized groups of users of music resisted efforts to compel them to pay compensation for the performance for profit of the Society's members; with the advent of radio broadcasting in 1922, powerful groups of radio broadcasters throughout the United States joined with the other groups, [fol. 22] aforementioned, in opposing the Society; such groups of users attacked the Society by interposing defenses in suits for infringement, by complaints made to the Attorney-General of the United States, by a suit brought against the Society in the State of New York, by attempts made annually in Congress for over fifteen years last past to amend the Copyright Act so as to permit the users of music to publicly perform for profit the musical compositions of the Society's members without compensation, by initiating tax legislation in various States, and lately by introducing into various States bills similar to the Statute of the State of Florida herein complained of, with a view of destroying and nullifying the rights of the Society's members given to them by the Copyright Act.

17. At the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society the exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time, the last contracts were signed prior to and became operative January 1, 1936; annexed hereto and made part of this complaint is the contract entered into on the 12th day of April, 1935 between complainant Carl Fischer, Inc. and the Society and marked Exhibit "B"; annexed hereto and made part of this complaint is the contract entered into on the 25th day of June, 1935 between [fol. 23] complainant Gene Buck and the Society and marked Exhibit "C"; the other complainants, G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, prior to January 1, 1936, executed and delivered to the Society

contracts in form similar to the contracts entered into between the Society and Carl Fischer, Inc. and Gene Buck; all of said contracts executed and delivered by the complainants to the Society expire by limitation of time on the 31st day of December, 1940; all of the publisher members of the Society have executed contracts similar to Exhibit "B"; all of the other members of the Society have executed contracts similar to Exhibit "C".

18. Annexed hereto and made a part of this complaint and marked Exhibit "D" are the present Articles of Association of the Society.

19. Complainants' respective businesses and occupations are lawful ones, and the pursuit thereof cannot be prohibited directly or indirectly; the rights vested in the complainants by the Constitution of the United States and the Copyright Laws enacted by the Congress thereunder are exclusive and cannot be limited, curtailed, forfeited, confiscated or circumscribed by any of the Statutes of the several States, including the State of Florida.

20. The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their income, power and coverage, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of the particular composition played; such licenses include likewise the right on the part of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts, so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and pub-



lishers; said rights granted by the Society are of great value to the users who have consistently and uniformly objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; and the Society since 1914 has looked after the interests not only of its own members, but of other members of the musical profession who have been in distress by reason of age and indulgence and who otherwise have been unable to support themselves, and the Society has paid sick benefits [fol. 25] to such individuals, as well as to its members, and has looked after the widows and orphans of indigent composers and writers throughout the United States whose families would otherwise have been objects of public charity; the individual complainants herein have neither the resources, funds, organization or ability to protect the musical copyrighted works in which they are authors and composers, or which they own, or in which they have renewal rights, or obtain renewals, against infringement by unauthorized performances for profit within the State of Florida in their individual capacity, and have been compelled, as aforesaid, to unite and combine for the purpose of preventing such infringement and enforcing the rights granted to them under the Copyright Act, and such rights cannot be enforced by said individual complainants without such combination; if the individual complainants were to create an agency within the State of Florida to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Florida and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of \$10,000., which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers.

21. Upon information and belief the State Statute was sponsored by an organized group of radio broadcasters and other users of music in an endeavor to destroy the Society

so that they might have for their own selfish aggrandizement free access to all musical compositions without compensation; said group of users caused a similar statute to be enacted by the State of Montana in or about February, 1937, known as Chapter 90 of the Laws of 1937 of the State of Montana; and they caused to be enacted in the State of Washington in or about March, 1937, a similar statute known as Chapter 218 of the Laws of 1937 of the State of Washington; and a similar statute in the State of Nebraska, known as Legislative Bill No. 478 of the Laws of 1937, and a similar statute of the State of Tennessee, known as Chapter 212 of the Public Acts of 1937; and similar bills have been prepared by such group of users who have circularized the legislatures of other States with a view to presenting to them for enactment similar statutes in all the forty-eight States; said State Statute was passed by the legislature of the State of Florida (as were the similar bills passed by the legislatures of the States of Montana, Washington, Nebraska and Tennessee) without an adequate opportunity for a hearing being afforded to complainants and others similarly situated. The following radio broadcasting stations in the State of Florida are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society, as well as for other purposes:

[fol. 27]

Station	Owner	Location
WFLA	Florida West Coast Broadcasting Company, Inc.	Clearwater
WRUF	State and University of Florida	Gainesville
WMBR	Florida Broadcasting Co.	Jacksonville
WIOD	The Isle of Dreams Broadcasting Corp.	Miami
WQAM	Miami Broadcasting Co., Inc.	Miami
WDBO	Orlando Broadcasting Co.	Orlando
WSUN	Chamber of Commerce of St. Petersburg	St. Petersburg
WDAE	The Tampa Times Company	Tampa

22. Annexed hereto and made a part of this complaint is a copy of the State Statute marked Exhibit "E".

23. The Society pursuant to the rights vested in it by the contracts made with complainants herein, and others

similarly situated, has for many years entered into numerous contracts which are now in force between it, acting on behalf of and jointly for all the members of Society and for the joint benefit of all such members, and users of music within the State of Florida. Under these contracts the Society has licensed such users to publicly perform for profit the musical compositions of its members; under these contracts, the Society licenses the users to perform all of the compositions in the repertoire of the Society and its affiliated foreign societies for a single license fee, fixed and determined by the Society in negotiations with the respective users.

With respect to radio broadcasters, the Society, after extensive negotiations with the National Association of Broadcasters, has charged a sustaining fee based upon the power, wattage, listening audience and other important factors connected with each station, plus a fixed percentage of the revenues derived by each radio broadcasting station from its sponsored programs, after making certain deductions.

With respect to motion picture theatres, the Society negotiated for a long time with the trade associations of theatre owners, and finally, a rate of ten cents per seat per theatre was agreed upon as a fair and reasonable rate. That rate was in operation for a great many years. Recently, in negotiations with the theatre owner associations, the rate was modified so that it is now, as follows:

- 10¢ per seat per year for theatres containing 800 seats and under;
- 15¢ per seat for theatres containing 801 to 1599 seats;
- 20¢ per seat above that number; and
- 5¢ per seat for all theatres under 800 seats, operating only three days a week.

The uniform rate for hotels with radio in each room is \$1.00 per room per year; in addition thereto, there is an annual rate for hotels having orchestras or giving other musical entertainment for the profit of the management, based upon the size, prestige, gross business, nature of entertainment, size of the orchestra, extent of music used and audiences attracted thereby, and the profits derived therefrom.

The license fees in all these cases are fixed and determined by the Society on behalf of all its members, after negotiations with either the trade association or the individual

user; there are about 367 contracts in force at the present [fol. 29] time from which the Society received for the year 1936 the sum of \$59,306.81; on or about the 15th day of January 1936, the Society entered into a contract with Isle of Dreams Broadcasting Corporation, proprietor of a radio broadcasting station having call letters WIOD, a copy of which is hereto annexed and made a part hereof and marked Exhibit "F", which contract is presently in force and effect, and has been duly performed both by the Society and by the radio broadcasting station; in addition to said contract, there are 11 other contracts made between the Society and the radio broadcasters in the State of Florida similar to Exhibit "F" presently in force and up to the enactment of said State Statute performed both by the Society and each respective broadcaster; on or about the 28th day of November, 1936, the Society entered into a contract with Marianna Theatres, Inc., proprietor of a motion picture theatre, known as the Ritz Theatre, Panama City, Florida, a copy of which is hereto annexed and made a part hereof and marked Exhibit "G", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the motion picture theatre exhibitor; in addition to said contract, there are 170 other contracts made between the Society and the motion picture theatres in the State of Florida similar to Exhibit "G" presently in force and up to the enactment of said State Statute being performed both by the Society and each respective motion picture theatre exhibitor; on or about the 8th day of January, 1937, the Society entered into a contract with Carling Hotel at Jacksonville, Florida, a copy of which is hereto annexed and made a part hereof and marked Exhibit "H", which contract is presently in [fol. 30] force and effect, and was made up to the enactment of said State Statute duly performed both by the Society and by the hotel owner; in addition to said contract, there are 183 other contracts made between the Society and hotels, restaurants, dance-halls and miscellaneous in the State of Florida similar to Exhibit "H" presently in force and up to the enactment of said State Statute duly performed both by the Society and each respective hotel, restaurant, dance-hall and miscellaneous establishment proprietor.

24. Societies similar in purpose and scope to the Society have been in existence and are organized and operating

under and by virtue of the laws of Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho-Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Roumania, Spain, Sweden and Switzerland.

By virtue of various treaties and proclamations of the Presidents of the United States, issued pursuant to Section 8 of the Copyright Act, and which are now in force between the United States and Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho-Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Roumania, Spain, Sweden and Switzerland, reciprocal rights are granted to citizens of the United States and to citizens of the foreign countries named whereby the citizens of such foreign countries are extended copyright protection within the United States, upon compliance with the Copyright Act with respect to their several musical compositions, and citizens of the United States are extended reciprocal protection, with respect to their several musical compositions, under the copyright acts of said countries [fol. 31] upon complying with the copyright acts thereof. Such reciprocal protection is based upon the determination that certain reciprocal conditions for the enjoyment of copyright exist as between the United States and such respective foreign states or nations, and is accorded under and by virtue of proclamations and treaties establishing the existence of such conditions, and having the force and effect of law.

Under contracts with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies under such contracts have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced



in said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. Their 44,000 members are scattered throughout the world, and they are not required to fix a selling price for all uses of their respective musical compositions in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid:

[fol. 32] 25. Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society, similarly situated, to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Florida by any purchaser of a sheet of music, phonograph record, music roll, electrical transcription or film, who pays the price thereof fixed by the publisher of such composition or the manufacturer of such phonograph record, music roll, electrical transcription or film; under Section 1 (e) of the Copyright Act of 1909, as amended, any manufacturer of parts of instruments serving to reproduce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured, but the Copyright Act provides that the payment of such royalty shall not free such articles or devices from further payment of royalties in case public performances for profit are made by means of such articles or devices; many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions; the Copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and [fol. 33] have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electri-

cal transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public performance for profit thereof. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Florida publicly for profit upon such a basis or on any basis wherein the fee or compensation would be included in the price paid for a copy of the sheet of music of said composition or phonograph record, music roll, electrical transcription or film thereof; complainants believe that such a requirement and compulsory license would deprive them of the exclusive rights vouchsafed to them under the Copyright Law.

26. If each complainant would be required to act independently in order to have the right to determine and fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Florida to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Florida; all the users of [fol. 34] music in the State of Florida paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of \$59,306.81. In the year 1936, users located in the following counties of the State of Florida paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount
Alachula	\$518.39
Bay	137.55
Bradford	27.00
Brevard	414.94
Calhoun	34.40
Citrus	63.00

County	Amount
Clay	7.50
Columbia	90.00
Dade	21,770.36
DeSoto	183.95
Duval	6,161.85
Escambia	1,748.45
Franklin	67.50
Godsen	79.50
Hamilton	23.75
Hernando	30.60
Hillsborough	6,334.10
Holmes	29.30
Jackson	130.40
Jefferson	20.50
Lafayette	20.00
La're C	190.79
Lee	82.27
Leon	535.02
Madison	38.20
Manatee	1,080.05
Marion	164.56
Monroe	154.00
Nassau	30.00
Okaloosa	20.70
Orange	3,691.61
Osceola	77.00
Palm Beach	1,791.42
Padco	50.00
Pinellas	9,646.40
Polk	1,047.22
Putnam	97.99
St. Johns	181.43
St. Lucie	260.55
Santa Rosa	95.30
Seminole	300.60
Sumter	25.40
Suwanee	40.00
Taylor	40.00
Volusia	1,706.26
Walton	42.00
Washington	25.00

Total

\$59,306.81

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute.

27. Complainants will be able to license users of their music in Florida without doing any act in said State, but unless the injunction prayed for herein is granted, complainants will be unable to issue any licenses from without the State of Florida without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Florida, and a great number of the copyrighted works of the complainants are being constantly performed in the State of Florida, and will continue to be performed in that State.

28. The following radio broadcasting stations within the State of Florida, and their respective locations, are affiliated with, and rebroadcast programs emanating from without the State of Florida, and respectively, in the studios of the Columbia Broadcasting System, Inc., National Broadcasting Co. Inc. and the National Independent Broadcasters, Inc.:

**Columbia Broadcasting System, Inc.**

Station	Location
WMBR.....	Jacksonville
WQAM.....	Miami
WDBO.....	Orlando
WDAE.....	Tampa
WJNO.....	West Palm Beach
WCOA.....	Pensacola

**National Broadcasting Co.**

WFLA.....	Clearwater
WJAX.....	Jacksonville
WIOD.....	Miami
WSUN.....	St. Petersburg

**National Independent Broadcasters, Inc.**

WMFJ.....	Daytona Beach
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[fol. 36] It is a general practice with respect to national networks to have musical programs performed in the City of New York and in other large cities and broadcast from the

radio station where such program is performed. At the same time the program is transmitted by telephone wires to other stations located throughout the country, and particularly the aforementioned broadcasting stations located within the State of Florida so that the broadcast originating in the home studio of the National Broadcasting Company or of the Columbia Broadcasting Company or of the National Independent Broadcasters, Inc., or of the Mutual Broadcasting System, as the case may be, is simultaneously performed by means of a broadcast from the connecting stations, including the abovementioned stations within the State of Florida; the programs broadcast by many stations outside of the State of Florida, whether affiliated or not with any station located within the State of Florida are heard within the State of Florida, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Florida broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Florida.

29. The said State Statute prevents complainants from licensing the broadcasting of their compositions outside of the State of Florida if such broadcast may be heard within or transmitted by wire or otherwise to the State of Florida; it deprives complainants of the means of detecting infringements in the State of Florida; it attempts to de- [fol. 37] prive complainants of unrestricted access to the Federal Court for redress for infringement of their copyrights; it sets up a system of compulsory price-fixing of copyrights in destruction of existing copyrights and of rights to obtain the full benefits of the Copyright Act in securing future copyrights; it interferes with the publication of complainants' copyrighted compositions by compelling them to keep a record of all purchasers of copies or records thereof in the State of Florida, and imposes upon them the impossible task of determining whether public performances for profit were given or authorized by purchasers of the sheets of music or of phonograph or other records thereof in the State of Florida, or whether such performances were made or authorized by persons who had purchased sheets of music or records without that State or



who had obtained so-called "professional" or complimentary copies thereof; unless the enforcement of this State Statute is restrained by this Court, other States in addition to Florida, Montana, Washington, Nebraska and Tennessee may enact similar Statutes requiring complainants to fix a price for all uses in each of such States, or may enact a compulsory price-fixing system entirely different from that enacted in each of the said States, all of which would work undue hardship on complainants and would violate the spirit of the Constitution and the Copyright Laws enacted thereunder.

30. Upon information and belief said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, [fol. 38] licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said State Statute.

31. The complainant publishers, in the regular course of their business, ship sheets of music from New York State into the State of Florida, as well as to all the other States of the Union. This is done solely in connection with their publishing business and has nothing to do with the licensing of the right of public performance for profit or any other rights given to the publishers or copyright owners under the Copyright Act. The purchasers of the sheets of music may use the same for purposes of private performance or for non-profit public performances, but they may not use them for the purpose of making mechanical records or for the purpose of public performance for profit, or for any other uses and purposes granted to the owners of the copyright by the Copyright Act.

The publishers and the Society have kept the sale of sheet music, which is the material object copyrighted, separate and apart from the copyright itself, in accordance with the provisions of the Copyright Act.

Under the State Statute, this right of separability is wholly denied. Under their contracts with the Society, the publishers reserve the right to restrict the public perform-

ance for profit of their musical compositions for the purpose of protecting investments in dramatico-musical productions wherein investments of hundreds of thousands of dollars are involved. Unless the publishers or other copyright owners can assure investors in such productions that there [fol. 39] will be no indiscriminate and wholesale public performances of the "hit" musical compositions in such productions, the production rights will be wholly destroyed. Under the State Statute, the only alternative left to complainant publishers is to wholly refrain from shipping sheets of music through the channels of interstate commerce into the State of Florida, and said State Statute directly compels the complainant publishers to withhold shipping music into said State, except upon condition that they forego rights granted to them under the Constitution and the Copyright Laws of the United States.

32. Upon information and belief, the said State Statute is not a reasonable exercise of the police power; it is a pretext under which the State of Florida is attempting to usurp power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.

33. The system of licensing provided for in said State Statute would deprive complainants and others similarly situated of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted [fol. 40] musical works, and of the right to determine the conditions under which such works might be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof.

34. The defendants, and each of them, individually and as respective officials charged with the duties of enforcing

said State Statute have threatened to, and will enforce such State Statute in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refuse to accept or submit to a system of compulsory licensing; and said defendants have threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for [fol. 41] the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail, or refuse to submit to the jurisdiction of the State Courts of Florida; and defendants have threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

35. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without

the State of Florida if the public performance for profit of such music may be reproduced or performed within the State of Florida. There are 47 counties in the State of Florida, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal contracts, and if complainants attempt to issue licenses or collect from licensees, or attempt to detect in- [fol. 42] fringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable Court; complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by any other means of rendition whatsoever within the State of Florida from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in the State of Florida; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of the State of Florida; complainants and others similarly situated, as well as the Society, have been compelled since the effective date of the Statute, to desist from licensing the public performance for profit of their copyrighted musical compositions in the State of Florida and have been deprived of all sources of revenue therefrom, and have been denied the privileges granted to them by the Copyright Act; and the Society has been compelled to desist from enforcing collection of payments under existing contracts between it and users since the effective date of said Statute, and has been compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of [fol. 43] their respective copyrighted musical compositions, and complainants will continue to suffer as aforesaid unless this Court grant an injunction as prayed for; and the complainants and the Society and its affiliated societies have been and will be hindered, delayed and impeded in enforce-

ing their rights and remedies under the Copyright Act in the Federal Court located in the State of Florida, for infringements committed by users within the State of Florida by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated will be unable to detect and sue for infringement of their copyrighted musical works within the State of Florida; unless this Court shall determine the validity and application of said Statute in this proceeding, complainants and others similarly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Florida, and they will therefore be deprived of their property and liberty without due process of law, and denied the equal protection of the laws, all in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Sections 1, 8, 11, 12 and 22 of the Declaration of Rights of the Constitution of the State of [fol. 44] Florida, and Article III Section 20 of the Constitution of the State of Florida; and complainants have no adequate remedy at law, and are relievable only in a court of equity and if complainants are not afforded the equitable relief prayed for herein, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under the State Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

36. Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of \$50,000.00; G. Schirmer, Inc. in excess of \$50,000.00; Irving Berlin, Inc. in excess of \$50,000.00; Gene Buck in excess of \$5,000.00; Deems Taylor in excess of \$5,000.00; Oley Speaks in excess of \$5,000.00; William J. Hall in excess of



\$5,000.00; Anne Paul Nevin in excess of \$5,000; Ella Herbert Bartlett in excess of \$5,000.00; and Jane Sousa in excess of \$5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1940, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants [fol. 45] and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and restrain the enforcement of such State Statute, such revenue may be lost to the Society, and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Florida, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions.

Said State Statute and each and every section thereof is unconstitutional and void under the aforesaid Articles and Sections of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution, Treaties of the United States with foreign nations, Presidential Proclamations and the Copyright Act of the State of Florida, and to subject [fol. 46] complainants to an unreasonable search and seizure of their properties, effects, papers and persons.

38. If defendants are not restricted in their threatened and attempted enforcement of such State Statute, complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law, but are relievable only in a court of equity.

Therefore, the complainants pray:

1. That defendants, and each of them, individually and in their respective capacities as officials of the State of Florida charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the abovenamed defendants, and each of them, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said State Statute, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute and each and every part and section thereof, as hereinabove prayed for.

3. That a writ of subpoena may issue to the defendants, requiring them to answer this bill of complaint fully and

truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of complainants' case may require, or to equity may seem just and proper.

Wideman, Wardlaw & Caldwell, Solicitors for Complainants, Office & P. O. Address, 1400 Harvey Bldg., West Palm Beach, Florida. Frank J. Wideman, of Counsel. Gene Buck; J. Field Wardlaw; Manley P. Caldwell, of Counsel.

No. 5242-5210

## AGREEMENT

between

J. Fischer & Bro. (Inc.), New York City, party of the first part, and Deems Taylor of New York City party of the second part:

I. J. Fischer & Bro. agree to publish Banks O'Doon — Captain Stratton's Fancy by Deems Taylor.

II. J. Fischer & Bro. agree to defray all expenses made necessary to produce printed copies of the first and all subsequent editions of the musical compositions mentioned in Article I.

III. Deems Taylor, party of the second part, or his assigns to receive in consideration of this agreement, ten per cent (10%) of the marked or retail price on every copy sold.

IV. In said J. Fischer & Bro., its successors or assigns, or legal representatives, shall be vested the exclusive right of copyrighting, publishing and vending the said musical compositions by Deems Taylor, party of the second part, or of making arrangements for so doing with its agents and representatives in all countries.

V. J. Fischer & Bro. agree to make settlement annually in the month of January as of January First.

VI. Copies of musical compositions mentioned in Article I. are to be printed and placed on sale when J. Fischer & Bro. find it convenient so to do.

VII. It is further agreed that said Deems Taylor, party of the second part, shall forthwith sell, assign, transfer and turn over to J. Fischer & Bro., party of the first part, his copyright and all his title and interest in and rights under the same unto the said J. Fischer & Bro., for the consideration aforesaid.

VIII. In said J. Fischer & Bro., party of the first part, its successors or assigns, shall be vested the rights during the full life of copyright to authorize or permit the performance of the musical compositions mentioned in Article I.

IN WITNESS WHEREOF the party of the first part has hereunto affixed its corporate seal and the party of the second part his hand and seal this Sixteenth day of March, 1923.

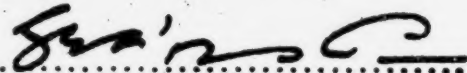
Witness:

J. FISCHER &amp; BRO.

A. Schmitt

as to

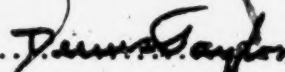
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H Roth

as to

by

 (L. S.)

36-1940

No.

Rec'd 4/25/35

Exhibit "B"

**Agreement Between**

**Carl Fischer, Inc.**

and

**American Society**

of

**Composers, Authors & Publishers**

**Thirty Rockefeller Plaza**

**NEW YORK CITY**

\_\_\_\_\_  
DATED:

**April 12th, 1935.**





AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (for brevity called "**Society**"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the **Owner** and/or in the name of the **Society**, or others in whose name the copyright may

same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12\*—As per rider below

SIGNED, SEALED AND DELIVERED, on this 12th day of April, 1935.

Owner

*Leah Fischer, Inc.*

*Per Walter Fischer, Pres*

AMERICAN SOCIETY OF COMPOSERS  
AUTHORS AND PUBLISHERS

Society

By *Joseph Young* Secretary

\*—12. This rider constitutes #12 of the foregoing contract.

By accepting this contract the Society agrees that all agreements heretofore or hereafter entered into with members for the period beginning January 1st, 1936, are or will be identical in all respects with this agreement.

**FOREIGN AGREEMENTS AT THIS DATE IN EFFECT**

(See paragraph 11 of the within agreement)

It is distinctly agreed and understood that the powers, rights, authorities and privileges vested in the Society by this instrument, do not include world rights, but are restricted to the United States, ———, Austria, Denmark, France, Belgium, Egypt, Greece, Holland, Japan, Monaco, Portugal, Roumania, Switzerland, Germany, Hungary and Italy.

1—8—36.

It is also understood and agreed that the powers, rights, authorities and privileges vested in the Society by the within instrument shall include Great Britain.

**1936-1940**

No.

Rec'd 6/25/35

Exhibit "C"

**Agreement Between**

**Gene Buck**

and

**American Society**

of

**Composers, Authors & Publishers**

**Thirty Rockefeller Plaza**

**NEW YORK CITY**

**DATED:**

**June 25th, 1935.**



AGREEMENT made between the Undersigned (for brevity called "**Owner**") and the **AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS** (for brevity called "**Society**"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may



stand, as parties plaintiff or defendants in suits or proceedings, or to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

SIGNED, SEALED AND DELIVERED, on this 26th day of June, 1935.

Owner

AMERICAN SOCIETY OF COMPOSERS  
AUTHORS AND PUBLISHERS

Society

By

Exhibit "D"

56

Articles of Association

of the

American Society

of

Composers, Authors

and

Publishers



AS IN EFFECT

1937

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Of  
AMERICAN SOCIETY of  
COMPOSERS, AUTHORS and  
PUBLISHERS

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**Article I**  
**Objects**

SECTION 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers," for the following purposes, to-wit:

- (a) To protect composers, authors and publishers of musical works against piracies of any kind;
- (b) To promote reforms in the law respecting literary property;
- (c) To Procure uniformity and certainty in the law respecting literary property in all countries;
- (d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;
- (e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;
- (f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;
- (g) To grant licenses and collect royalties for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;
- (h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings, involving the right of public performance of any work of any member, or the question of authorship in any work of any member;
- (i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;
- (j) To acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the society.
- (k) To enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society.
- (l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

SECTION 2. The principal office of the Society is to be located in the City of New York.

**Article II**  
**Duration**

The duration of the Society shall be ninety-nine years.

**Article III**  
**Membership**

SECTION 1. The membership of this Society shall be divided into five classes, as follows:

**Music Publishers**

Any person, partnership, firm or corporation regularly engaged for a period of not less than one year in the music publishing business shall be eligible to membership in this class.

**Composers and Authors**

Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class.

**Non-Participating**

Each person, partnership, firm or corporation hereafter elected to membership shall be first assigned to this Class, and shall remain therein for a period not exceeding one year from election. At the termination of the said period the Board of Directors shall, by two-thirds vote of those present, determine whether the membership in this class shall continue, and if so for what additional period, or shall be transferred to the appropriate one of the two preceding classes, or be discontinued. No such membership shall, however, be discontinued except after due notice to the member and an opportunity afforded him to appear before the Board of Directors and show cause why the same should not be discontinued.



Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the two preceding classes of members.

#### ***Honorary Membership***

Any person, firm or corporation which has rendered to the art or industry of music, or to this Society, a notable or conspicuous service, may be eligible in this Class and elected thereto by unanimous vote of the Board of Directors. All nominations in respect of this class of membership shall, however, be tabled at the meeting first presented, and may not be acted upon until or after the next succeeding meeting.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the first two Classes hereinabove described.

#### ***Successors of Deceased Composers and Authors***

Any person who has acquired, by will or under any law, the right, title and interest of a deceased composer or author in any musical works, including the right of public performance thereof, may be elected to membership under this Class. Members of this Class shall not have voting power or be eligible to office.

#### ***Dues***

SECTION 2. The annual dues, payable on the first day of January in each year, shall be as follows:

Music Publishers .....	\$50.00
Composers and Authors .....	10.00
Successors to Deceased Composers and Authors .....	10.00

Upon election to either of the above Classes the member shall pay the pro-rata of annual rate to the first day of the following January, and thereafter at the annual rate of his Class.

Non-Participating .....	None
Honorary .....	None

Unless otherwise directed by the Board of Directors, all sums received in payment of dues shall be for the use and benefit of the Relief Fund of the Society.

Upon the default in excess of ninety days in payment of any dues, after notice thereof to the member, the Board of Directors may suspend or expel the delinquent member.

#### ***Application for Membership***

SECTION 3. Shall be made in writing upon a printed blank form prepared by the Committee on Membership. Every application shall be signed by an individual applicant in person, by a firm, through a co-partner, by an association or corporation through a duly authorized officer. The application shall be submitted to the Membership Committee and shall be accompanied by proof of eligibility to membership.

#### ***Intent of Application***

SECTION 4. The signing and presentation of such an application to the Membership Committee, shall be deemed and construed to be an agreement on the part of the applicant to fulfill, duly perform, and abide by the Articles of Association, and all requirements herein contained; and to conform to, duly perform and abide by, all by-laws, rules, regulations or resolutions, whether expressed in the Articles of Association or otherwise, which may be in force at the time of such application or may thereafter from time to time be adopted, and to all amendments of and additions to the Articles of Association, by-laws, rules or regulations which after the time of such application may from time to time be adopted.

#### ***Election to Membership***

SECTION 5. A majority vote of all members of the Board of Directors shall be necessary to elect an applicant to membership.

#### ***Obligation of Applicant***

SECTION 6. Each member shall, upon election to Active Membership, execute an assignment in such form as the Board of Directors shall approve, vesting in the Society the exclusive right to license the non-dramatic public performance of the members works for the period of any then existing agreement between the Society and its members.

#### ***Members' List of Works***

SECTION 7. The applicant on being elected to membership shall, upon request, state upon a regular printed form furnished by the Secretary, a brief title, description and the date of copy-

right, of each work published or written by him. Each member shall upon the publication of any work of which he is the author, composer or publisher, furnish to the Secretary, a brief title, description, and the date of copyright thereof.

#### ***Transfer of Non-Participating Member***

SECTION 8. Upon the transfer of a non-participating member to either "Music Publisher" or "Composers and Authors" Class, and before the transfer shall be deemed as in effect, the member shall execute and deliver to the Society an assignment of non-dramatic public performing rights, in the form submitted by the Society, all of which rights so vested in the Society shall be known as the "performing rights" and are to be held and enjoyed by the Society from the date of election to expiration of any then existing agreement between the Society and its members.

#### ***Membership Roll***

SECTION 9. It shall be the duty of the Membership Committee to prepare and keep a membership roll or list of members of the Society.

#### ***False Representation by Member***

SECTION 10. Whenever it shall appear to a majority of the Membership Committee that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement, it shall report the case to the Board of Directors, who by a two-thirds vote of all the members of the Board may expel the member after a trial as in these articles provided.

#### ***Failure of Member to Qualify***

SECTION 11. If within six weeks after the transfer of a "Non-Participating" member to either "Music Publishers" or "Composers and Authors" Class, the members shall have failed to execute and deliver to the Society the assignment as provided by Section 8 preceding, and to comply with all other rules, regulations and requirements of the Society, the membership shall be discontinued.

#### ***Voting***

SECTION 12. No co-partnership, firm, association or corporation shall have more than one vote or representative in the Society. In case of a co-partnership, a member thereof, and in case of an association or corporation, an officer thereof, shall be duly designated as its representative. Such designation shall be filed with the Secretary of the Society.

### ***Article IV Management Board of Directors Elections***

SECTION 1. The government of the Society shall be vested in, and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. They shall be divided into three divisions of equal number. At the first election hereafter held one division, consisting of four publishers, two authors and two composers, shall be elected for one year; one division similarly constituted for two years and one division similarly constituted for three years; but when the term of each division expires their successors shall be elected by the Board of Directors for three years.

At all times six of the members of the Board shall be composers, six authors and twelve publishers. Any vacancy in the Board shall be filled from the class of members in which the vacancy occurred and shall by nomination of the remaining Board members of such class, be elected by a two thirds vote of the directors present.

Thirteen members shall be necessary to constitute a quorum, and the affirmative vote of two-thirds of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any act or thing within the power of the Board. Any number less than a quorum may meet and adjourn from time to time until a quorum be present.

The Board may determine the rules of its procedure and make any and all regulations necessary for the carrying on of the business of the Board of Directors and the officers, agents and servants of the Society.

Any former President of the American Society of Composers, Authors and Publishers shall be ex-officio member of the Board of Directors, without the right to vote. *Adopted—March 25, 1931.*



### ***Meeting of Board***

SECTION 2. The Board shall meet at least once in each month except in the months of July, August and September, and shall hold an annual meeting in the month of January of each year. Notices of regular or special meetings of the Board of Directors shall be given by mail by the Secretary to each director at his last known post office address at least two days previous to the time fixed for the meeting. Special meetings of the Board of Directors may be called by the President or Secretary, and shall be called by either of them on written request of any seven directors.

### ***Report of Board at Meetings***

SECTION 3. The Board of Directors shall keep a record of its proceedings which shall be submitted at the annual meeting of the Society, and shall report at such meeting, or at any special meeting of the Society, any business which in its judgment requires the action of the Society.

## ***Article V***

### ***Powers of the Board of Directors***

#### ***Management***

SECTION 1. The Board of Directors shall have charge of and supervision over the general management of the business of the Society, and in addition to the powers by these articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done by the Society.

#### ***Contracts***

SECTION 2. Without prejudice to the general powers conferred by the last preceding section and the other powers conferred by these articles, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To make contracts or authorize contracts to be made by officers of the Society or by any of the committees provided for by these articles; to fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; to collect such royalties; to maintain all legal proceedings necessary to enforce payment of such royalties and compromise claims for damages and penalties for unlawful performances; to distribute among the members the royalties collected in the proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles; to enforce the fulfillment of all contracts, both on the part of the members of the Society and third parties, that may have been made by the Society; to authorize the prosecution and defense of any matter, action or proceeding within the scope of the Society, or affecting its interests or involving the rights of public performance of any work of any member or the question of authorship in any work of any member.

To purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire, at such prices and on such terms and conditions, and for such considerations, as it thinks fit.

To appoint and at its discretion remove or suspend, such assistant secretaries, assistant treasurers, managers, subordinates, assistants, clerks, agents and servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as it may think fit.

To confer by resolution upon any committee or officer of the Society the right to choose, remove or suspend such subordinate officers, agents or servants.

To determine who shall be authorized to sign, on the Society's behalf, receipts, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Society in such manner as it thinks fit, and in particular from time to time to delegate any of the powers of the Board of Directors to any Committees, officers or agents, and to appoint any persons to be the agents of the Society, with such powers (including the power to sub-delegate) and upon such terms as may be thought fit.

To appoint and dissolve all committees; to define, alter and regulate the jurisdiction and exercise original and supervisory jurisdiction over any and all subjects and matters referred to said committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members and punish such as may be found guilty.

The Board of Directors shall have the power to make such regulations and to take such action not inconsistent with the articles of association and the by-laws, as it may deem advisable for the

protection of the property and for the general objects of the Society. It shall adopt a seal of the Society.

The Board of Directors shall have the control over and power of disposition of all funds belonging to the Society. It shall determine the manner and form of their investment and the depositaries of such funds.

#### ***Salaries of Directors***

SECTION 3. Directors as such shall not receive any salaries for their services except that the sum of \$240 may be appropriated out of the treasury at each meeting of the Board of Directors for distribution as attendance fees among such directors of the 24 members of the Board as shall be present within five minutes after the meeting has been called to order.

In case a director shall be absent from three consecutive meetings of the Board of Directors, unless he shall have been by the President excused from attendance, his office as a Director, and any other office held, shall be declared vacant, and at the next regular meeting of the Board of Directors a successor shall be elected.

SECTION 4. That no resolution increasing salaries or granting emoluments to officers and employees receiving \$5,000.00 yearly or more, or making unusual or extraordinary expenditure or financial commitment may be passed by the Board of Directors until such resolution is first proposed at a regular or special meeting of the Board of Directors and laid upon the table for final action at its next succeeding meeting. Notice of the meeting at which such resolution is to be voted upon granting the same must be given to the members of the Board in writing at least five days in advance.

Adopted—March 28th, 1929.

#### ***Vacancy in Board of Directors***

SECTION 5. In case of the death, removal or resignation of a director, or of any vacancy in the Board of Directors, such vacancy shall be filled by the election of a director belonging to the same class of directors as the member of the Board whose place is to be filled, for the unexpired term, at the next regular meeting, in the manner provided for the election of directors by the Board of Directors at annual meetings.

#### ***Removal or Suspension of Director or Officer***

SECTION 6. In case, at any regular or special meeting of the Board of Directors, two-thirds of those present shall be of the opinion that sufficient cause exists for the removal of any director or officer from such office, and that his removal is for the best interest of the Society, a special meeting of the Board of Directors shall be called, upon three days' written notice to each of the directors, specifying the charges against the director or officer against whom such are directed, and a copy of such charges shall be served upon the director or officer so charged, at least three days before such special meeting. In case, at such special meeting, the directors shall after hearing such director or officer, determine by an affirmative vote of two-thirds of all the directors in office, that sufficient cause exists for his removal, and that his removal is for the best interest of the Society, then such person shall immediately cease to be a director or officer as the case may be, and the resulting vacancy shall be filled as provided in Section 5 next above.

The Board of Directors may suspend from office any officer or director against whom charges have been preferred.

#### ***Disqualification of Member of Board of Directors***

SECTION 7. No member of the Board of Directors shall be disqualified from participating in any meeting, action or proceeding of any kind whatever of said Board of Directors, by reason of being or having been a member of a Standing Committee or Special Committee which has made prior inquiry, examination or investigation of the matter under consideration. Nor shall any member of any Standing or Special Committee be disqualified, by reason of such membership, from acting as a member of the Board of Directors upon any appeal from any decision of such Standing or Special Committee. But no member shall participate in the adjudication of any case in which he is personally interested.

#### ***Examination of Member***

SECTION 8. The Board of Directors may, by a two-thirds vote of its members present, require that any member of the Society shall submit to the Board of Directors or any Standing or Special Committee, for examination, such portion of his books or papers as are material and relevant to any matter under investigation by said Board of Directors or by any Standing or Special Committee.



Any member who shall refuse or neglect to comply with such requirements, or shall wilfully destroy any such required evidence, or who, being duly summoned, in pursuance of a two-thirds vote of the members of the Board of Directors present, shall refuse or neglect to appear before the Board of Directors or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Society.

#### ***Final Decision by Trial***

SECTION 9. Any hearing or trial may be adjourned, from time to time, by the Board of Directors in its discretion; but no member thereof, who shall not have been present at every meeting of said Board of Directors at which evidence is taken, or at which an accused member, or a member whose conduct is involved in the hearing or trial, is heard; shall participate in the final decision.

#### ***Article VI Officers***

SECTION 1. Shall consist of a President, two Vice-Presidents, a Secretary, Assistant Secretary, a Treasurer and an Assistant Treasurer who shall be Directors of the Society, and a Counsel who need not be a member of the Society.

#### ***Election of Officers***

SECTION 2. The President, the Vice-Presidents, the Secretary, Assistant Secretary, the Treasurer, and Assistant Treasurer, shall be elected annually by the Board of Directors by a two-thirds vote of the entire board, and such officers shall hold the same offices in the Board of Directors. Each officer, excepting the Counsel, shall serve for the term of one year and until the election and qualification of his successor.

#### ***Appointment of Counsel***

SECTION 3. The Counsel shall be appointed by the Board of Directors for such term as may be decided by the Board.

#### ***Vacancy of Office***

SECTION 4. In case a vacancy shall occur in the office either of the President, Vice-Presidents, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer, an election shall be held forthwith to fill vacancy for the unexpired term.

#### ***Expulsion or Suspension of Officer***

SECTION 5. The expulsion or suspension of a member holding any office or position, to which he has been either elected or appointed, shall create a vacancy therein which shall be filled as provided in these articles.

#### ***Article VII The President***

SECTION 1. The President shall be the chief executive officer of the Society. He shall preside at all meetings of the Board of Directors. He shall have general supervision over the business affairs and property of the Society and over its several officers.

He shall see that all orders and resolutions of the Board of Directors and of the Society are carried into effect and he shall sign all contracts and agreements authorized by the Board of Directors, unless the Board shall otherwise direct. The President shall submit to the Board of Directors, as soon as may be after the close of each fiscal year, and to the members at each annual meeting a complete report of the operations of the Society or the preceding year, and of the state of its affairs, making such recommendations as he thinks proper, and he shall from time to time report to the Board of Directors all matters within his knowledge which the interests of the members may require to be brought to its notice. The President shall be ex-officio a member of all standing committees.

#### ***Article VIII The Vice-President***

SECTION 1. The Vice-President shall have such powers and perform such duties as the Board of Directors may from time to time prescribe, and perform such other duties as may be prescribed in these by-laws. In case of the absence of the President or his inability to act, the Vice-President shall discharge the duties of the President.

**Article IX**  
**The Treasurer**

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**SECTION 1.** The Treasurer shall have charge of the funds, securities, receipts and disbursements of the Society. He shall deposit all moneys and other valuable effects in the name and to the credit of the Society in such depositories as the Board of Directors may from time to time designate. He shall disburse the funds of the Society as may be ordered by the Board, by checks or drafts upon the authorized depositories of the Society, signed by the President or Vice-President and countersigned by himself or an assistant Treasurer. He shall take and preserve proper vouchers for all moneys disbursed. He shall render to the President or to the directors, at the regular meetings of the Board, whenever the President or said Board shall require him to do so, and at every annual meeting of the Society an account of the financial conditions of the Society and of all of his transactions as Treasurer; and as soon as may be after the close of each fiscal year he shall make and submit to the Board of Directors a like report for each fiscal year. He shall keep at the principal office of the Society full and correct books of account of all its business and transactions. He shall give to the Society a bond in such sum as the Board of Directors may from time to time designate conditioned for the faithful performance of the duties of his office and the restoration to the Society at the expiration of the term of his office or in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Society. In the absence of the Treasurer or his inability to act, the Assistant Treasurer shall perform all the duties of the Treasurer. The Treasurer shall pay no bills unless they are properly certified by the officer or committee authorized by the Board of Directors to make the expenditures. The books and accounts of the Society shall be audited monthly in such manner as the Board of Directors may order.

**Article X**  
**The Secretary**

**SECTION 1.** The Secretary shall be ex-officio Secretary of the Board of Directors and of all standing committees. He shall record all the votes and proceedings of the meetings of the Society, and of the Board of Directors, and of all committees, in a book or books. He shall record all the votes and proceedings of the meetings of the Society, and when authorized by the Board of Directors he shall affix such seal to any instrument requiring the same. He shall countersign all contracts and agreements signed by the President. The seal of the Society, so affixed, shall always be attested by the signature of the Secretary, or an Assistant Secretary. He shall give notice of all meetings of the Society, and of the Directors, and of all committees and of all calls for assessments to be paid by the members. The Secretary shall also have such other powers and perform such other duties as pertain to his office, or as the Board of Directors may from time to time prescribe. In the absence of the Secretary or his inability to act, the Assistant Secretary shall have all the foregoing duties.

**Article XI**  
**The Counsel**

The Counsel shall be the legal adviser of the Society, the Board and the various committees. He shall have supervision of all matters involving legal questions, and shall appear for the Society in all actions or proceedings.

**Article XII**  
**Absence or Suspension of Officer**

In case of the absence of the President, a Vice-President, the Secretary, Assistant Secretary, the Treasurer or Assistant Treasurer, or in case of the suspension of any such officer pending his trial on charges, the Board may delegate his powers and duties to any other officer, or to any Director for the time being.

**Article XIII**  
**Order of Business, Directors' Meetings**

The order of business at the meetings of the Board shall be as follows:

1. A quorum of thirteen members being present the President shall call the Board to order.
2. The minutes of the last meeting shall be read and considered as approved, if there be no amendments.
3. Reports of officers of the Society.
4. Reports of Committees.



5. Unfinished business.
6. Miscellaneous business.
7. New business.

#### **Article XIV** **Standing Committees**

**SECTION 1. FINANCE COMMITTEE.** There shall be a Finance Committee of three Directors appointed by the President, who shall attend to and supervise all the fiscal operations of the Society to the extent and in the manner directed by the Board, and this or such other committee as may be appointed by the President shall examine all accounts of the Society at the close of each fiscal year and at such other times as may be deemed necessary, and report thereon.

**SECTION 2. ADMINISTRATIVE COMMITTEE.** The President may also appoint an Administrative Committee from the members, who shall advise with and aid the officers of the Society in all matters concerning its interests and the management of its business and generally perform such duties and exercise such powers as may be prescribed or delegated by the Board of Directors from time to time. This Committee shall consist of such number as the President shall from time to time see fit. (See Section 5.)

**SECTION 3. MEMBERSHIP COMMITTEE.** The President shall appoint a Membership Committee consisting of five directors who shall pass upon the applications filed with the Committee and shall verify the statements therein contained, and may require of each applicant additional proof of eligibility to membership.

**SECTION 4. COMPLAINT COMMITTEE.** The Complaint Committee shall consist of three members of the Board appointed by the President.

Any member against whom a complaint is made before this Committee of violation of the Articles of Association, the by-laws or any resolution of the Society, or of the Board of Directors, regulating the conduct of the members, or of any conduct or proceeding inconsistent with the Articles of Association, or of misconduct, fraud, fraudulent acts or acts derogatory to the welfare of or prejudicial to the Society, shall be notified thereof, and if he desires he shall be heard in his defense, and shall be afforded an opportunity to examine all charges, papers and evidence submitted to the Committee, and to make answer thereto. The Committee shall have power to make rules respecting hearings upon such complaints. Proceedings before the Committee shall be confidential, and shall be disclosed only as the Directors order, after the proceedings have been reported to them. Should the circumstances warrant, the complaint shall be referred to the Board of Directors with all evidence taken before the Committee, and the Board, after investigating said charges, shall summon before it the accused member where he shall have an opportunity to be again heard in person before final action in the case, and, if in the opinion of the Board, the charge or charges against said accused member be substantiated, it may by a vote of not less than two-thirds of the entire Board, censure, fine, suspend or expel said member, and the decision of the Board of Directors shall be conclusive and final.

**SECTION 5. TERM OF COMMITTEES.** All standing committees shall be appointed for a term of one year, and shall remain in office until successors are appointed, or until vacated or voided by the Board of Directors.

Except as to the Administrative Committee the membership of Committees shall consist exclusively of members of the Society.

**SECTION 6. CLASSIFICATION COMMITTEE.** There shall be two Classification Committees for the allotment of royalties—one for the classification of "Music Publisher" members and one for the classification of "Composer and Author" members. The Classification Committee for the Music Publisher Members shall consist of the publisher members of the Board of Directors, and the Classification Committee for the composer and author of members shall consist of the composer and author members of the Board of Directors.

Each such committee shall meet not less than once in each quarter for the purpose of classifying the members over which it shall have jurisdiction.

It shall be the duty of the Classification Committee to determine the status of each member of the Society with respect to the share of the royalties to which he is entitled in the distribution of royalties directed to be made by the Board of Directors. Such Committees, in fixing the status of a member shall take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifications, standing and service which such member has rendered to the



Society. Such Committee shall, before any distribution of royalties is ordered by the Board, review and revise the classification of the respective members, to the end that the allotment and apportionment of the royalties among the respective members shall be fair, just and equitable to the entire membership.

The Classification Committee shall create several classes, each such class to consist of a group of members having a like status; each member of such group to share equally in the distribution of royalties with the other members of such group. The Committees shall diligently and industriously make due and proper investigation, before each distribution, of the members' standing and advance or reduce a member, as the case may be, from one class to another as the facts and circumstances may warrant, based upon the standards hereinabove set forth.

#### ***Protest and Appeal from Classification***

Any member, aggrieved by his classification may, after any distribution, file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a sub-committee to investigate such protest.

The Committee shall make its decision within thirty days from the date of filing the protest. The member shall have the right to appeal from such decision to the Board of Directors by filing a notice of appeal in writing with the Secretary of the Society, in which case the protest, with all evidence taken before the Committee shall be referred to the Board of Directors. The Board, after investigating such protest, shall determine the classification of such member by a vote of not less than two-thirds of the directors present. The decision of the Board of Directors shall be conclusive and final. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

#### ***Writers' Board of Appeals***

In addition to the composer and author Classification Committee, there shall be elected annually from the general membership (publisher members not voting) three committees, each to consist of three members, one committee of popular song composers and authors, one committee of production composers and authors, and one committee of standard composers and authors; these three committees shall constitute a composer and author board of appeals of nine men, and the personnel of said committees shall be made up as follows:

The Secretary of the Society shall, prior to ninety (90) days before the annual meeting, mail to the class AA members in the popular and production groups, a complete alphabetical list of all Class AA composer and author members of each group and to all standard members a complete alphabetical list of all Class AA composer and author members to BB (inclusive) without disclosing the classification of any of those whose names appear on the list; he shall at the same time mail to Class A through B (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class A through B members and each of these respective groups without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to the standard and composer groups from Classes B through C (inclusive), without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to Class CC through 3 (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class CC through 3 (inclusive), members of each of these groups without disclosing the classification of any of the members whose names appear on the list, and mail to the standard group classes DD through 3, a complete alphabetical list of members of these groups without disclosing the classification of any of the members whose names appear on the list.

The members of each group shall vote to elect one member of said group to each of the three committees constituting the composer and author board of appeals; the person receiving the greatest number of votes in his respective group shall be deemed to be elected to said board of appeals; in the event such member is not available for service, then the person in the same group receiving the next greatest number of votes shall automatically take the place of the absentee as an alternate member of the Board of Appeals.

These nine men so elected shall constitute the Board of Appeals, and said Board shall consist of the following three committees taken from the following groups of classification:

1 member on the Popular Writers' Committee from Class AA.

- 1 member on the Popular Writers' Committee from Classes A through B (inclusive).
- 1 member on the Popular Writers' Committee from Classes CC through 3 (inclusive).
- 1 member on the Production Writers' Committee from Class AA.
- 1 member on the Production Writers' Committee from Classes A through B (inclusive).
- 1 member on the Production Writers' Committee from Classes CC through 3 (inclusive).
- 1 member on the Standard Writers' Committee from Classes AA through BB (inclusive).
- 1 member on the Standard Writers' Committee from Classes B through C (inclusive).
- 1 member on the Standard Writers' Committee from Classes DD through 3 (inclusive).

The procedure on appeals shall be as follows:

Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary that he proposes to appeal to the Committee on the Board of Appeals which represents his particular group (popular, production or standard), the said Committee shall entertain his appeal and give him an opportunity to appear in person, if he so desires, or to present his appeal in writing, or both; if the said Committee decides against the member, its decision shall be deemed final; if said Committee decides in favor of the member, its decision shall likewise be deemed final, unless the Classification Committee feels that it is to the interest and welfare of the Society that a further appeal be allowed; in such case, the Classification Committee shall so state in writing, and an appeal may thereupon be taken by the Classification Committee, itself, to the entire Board of Appeals of the composers and authors, consisting of nine members; such appeal may be presented in writing or by oral hearing, or both; the decision of such Board of Appeals shall be considered final.

Members shall be given not less than five (5) days notice of the date when their appeal will be heard.

Appeals shall be heard in regular order, and the Board of Appeals shall meet at least once every three months, and until all appeals have been heard.

A majority vote of the Board of Appeals shall rule.

If a member of the Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Classification Committee and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

The Classification Committee shall delegate one of its members to be at the disposal of the said Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Board of Appeals whenever so requested; the counting and tally of ballots of election shall be under the direction and supervision of the General Manager and President of the Society; the election of the members of the Committees and Board of Appeals of the Composers and Authors, shall take place at least one month prior to the annual meeting of the Society, and the results thereof shall be announced at the annual meeting of the Society, each year, except that the first election shall take place not more than two (2) weeks after the passing of this amendment by the general body.

The decisions of the Board of Appeals, with respect to the proper classification of members, shall not be retroactive.

The Board of Directors of the Society shall make the rules of procedure by which the Board of Appeals shall be governed.

If any member of the Board of Appeals is advanced out of the class and group from which he is elected, then he shall immediately be replaced by his alternate in that particular class and group.

No member elected to serve on the Board of Directors of the Society shall be eligible to serve on the Board of Appeals.

The Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers, under Article XIV, Section 6, and at all times take into consideration all data, etc., which from time to time are used by the Classification Committee in arriving at the just classification of members.

The Board of Directors shall, at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Board of Appeals, at such times as they are required to hold meetings.

The foregoing provisions shall apply only to Author and Composer members of the Society, and not to Publisher members.

This amendment is to take effect immediately.



In addition to the Classification Committee for the music publisher members, there shall be elected annually from the general membership (composer and author members not voting) two separate committees of three members each, to be known respectively as the

- (1) "Popular Publishers' Board of Appeals"
- (2) "Standard Publishers' Board of Appeals"

and the personnel of each of said committee shall be selected as follows:

(1) The Secretary of the Society shall, prior to ninety (90) days before the Annual Meeting, mail to each and every publisher-member a complete alphabetical list of all publisher-members of the Society, without disclosing the classification of any of such members; he shall also at the same time send to each publisher-member a ballot.

(2) The publisher-member shall, prior to the Annual Meeting, fill out said ballot, each "Popular" publisher-member voting for three members of the "Popular Publishers' Board of Appeals"; and each "Standard" publisher-member voting for three members of the "Standard Publishers' Board of Appeals".

Each such ballot shall be returned by mail to the Society and shall be opened and inspected jointly by the President and General Manager of the Society who shall make a record of each vote. The three persons receiving the highest number of votes in each class shall be deemed elected the members of the indicated ("Popular" or "Standard") Publishers' Board of Appeals and the three persons in each class receiving the second highest number of votes shall be deemed to be alternates to serve in place of those elected in any case and under all circumstances and with the full powers of the duly elected incumbent in the event of his inability or refusal for any reason to serve.

(3) Appeals of "Popular" publisher-members may be presented to and considered by the "Popular Publishers' Board of Appeals" only, and appeals of "Standard" publisher-members may be presented to and considered by the "Standard Publishers' Board of Appeals" only.

(4) The Publishers' Board of Appeals shall meet only in the City of New York, and their respective procedure on appeals presented to them shall be as follows:

(a) Any publisher-member who is dissatisfied with the decision of the Publishers' Classification Committee, may give notice in writing to the Secretary that he proposes to appeal to the appropriate Publishers' Board of Appeals; the said Publishers' Board of Appeals shall entertain his appeal and give appellant an opportunity to appear in person, if he so desires; or to present his appeal in writing, or both; on such appeal a sub-committee appointed by the Publishers' Classification Committee may also appear and give evidence justifying its classification of said publisher member; if the said Publishers' Board of Appeals decides against the publisher-member, its decision shall be deemed final.

(b) If the said Publisher's Board of Appeals decides that the publisher-member has been improperly classified, said Board shall bring up such question for review before the Board of Directors as a whole, within thirty (30) days after the filing of the decision of the Board of Appeals and the Board of Directors shall proceed with the question in the manner provided for by these Articles of Association, and the decision of the Board of Directors shall be final.

(c) No member of the Publishers' Classification Committee nor of the Board of Directors shall be eligible to serve as a member of either Publishers' Board of Appeals, nor shall there be eligible to membership on said Board, more than one individual representative of a firm of publishers; such member is to be designated by the firm or corporation publisher-member and his name placed on file with the Secretary of the Society, prior to the annual vote; the expression—"Firm of Publishers" shall include not only publisher-members, corporate, partnership or individual, but all firms, whether corporate, partnership or individual allied with or subsidiary to such publisher-member. If a member of either Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Publishers' Classification Committee, and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

(d) A majority of the Board of Appeals shall rule; publisher-members shall be given not less than ten (10) days' notice of the date when their appeal will be heard; appeals shall be heard in regular order.

(e) The Publishers' Classification Committee shall delegate at least one of its members to be at the disposal of the said Publishers' Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Publishers' Board of Appeals whenever so requested.

(f) The Publishers' Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers under Article XIV, Section 6, and must at all times take into consideration all data, etc., which from time to time are used by the Publishers' Classification Committee in arriving at the just classification of members.

(g) The Board of Directors shall at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Publishers' Board of Appeals at such times as they are required to hold hearings.

(h) The General Manager shall, within ten (10) days after the adoption of this amendment send to each publisher-member a form upon which the said member shall be required to indicate into which class of membership, "Popular" or "Standard" he desires to be registered. Upon registration in such class a member may vote as provided in Paragraph 2 above only for members of the Publishers' Board Appeals of the Class indicated.

Any appeal brought by such member shall be considered only by the Board of Appeals functioning in respect to that class. However, a member desiring to change his class may do so upon request in writing addressed to the Secretary of the Society and approval of such request by the Board of Directors.

(i) The foregoing provisions shall apply only to publisher-members, and not to author and composer members of the Society.

This amendment to take effect immediately.

**SECTION 7. RELIEF COMMITTEE.** There shall be a Relief Committee of three Directors, appointed by the President, consisting of one publisher, one author and one composer, who shall investigate requests or applications for relief on behalf of a sick, infirm, needy or deserving member or his widow, infant children or indigent parent. Upon the recommendation of such Committee the Board may direct the payment of such sum or sums as in its judgment will satisfy the immediate necessities of such person or persons, and to make advances, from any royalties thereafter to accrue to the member, such advances to be repaid to the Society by deducting the whole or any part thereof from any subsequent distributions awarded to such member.

The Board of Directors shall annually devote a part of the proceeds derived from its operations to the purpose of giving financial aid to members of the Society, their widows, infant children or indigent parents. The giving of such assistance is optional and shall only be granted in cases of urgent necessity, and the Society does not vouchsafe to its members the right to receive assistance. Any moneys paid out on account of relief must always be entered in the books of the Society with a statement of the actual purpose for which they were disbursed, and not merely under the head of "Relief."

#### **Article XV**

##### **Apportionment of Royalties**

**SECTION 1.** All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half ( $\frac{1}{2}$ ) thereof to be distributed among the "Music Publisher" members, and one-half ( $\frac{1}{2}$ ) among the "Composer and Author" members respectively.

##### **Reserve Fund**

**SECTION 2.** The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a portion of the royalties as and when collected be placed in such reserve fund.

##### **Unclaimed Royalties**

**SECTION 3.** Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society.



**General Powers and Duties of Committees  
Quorum of Committees**

SECTION 1. A majority of each committee shall constitute a quorum thereof.

**Meetings of Committees**

SECTION 2. Each Committee, unless otherwise voted by the Committee, shall meet at least monthly upon a date to be fixed by the Committee, except during the months of July, August and September. The Secretary shall send notices of each meeting to the members thereof at least three days in advance of the meeting.

**Absence of Member of Committee**

SECTION 3. If any member of any Committee is absent from two successive meetings without an excuse presented to the Committee, his place may be declared vacant by the President.

**Minutes of Committee**

SECTION 4. The standing committees shall keep regular minutes of their transactions and cause them to be recorded in a book kept in the office of the Society for that purpose, and report the same to the Board of Directors at its regular meetings.

**Article XVII**

**Special Committee**

Whenever any twenty-five members of the Society shall certify to the Board of Directors that they desire the Society to prosecute any matter within the scope of the Society, the President shall appoint a special committee to investigate the matter and report to the Board of Directors with its opinion thereon whether it is advantageous and for the best interest of the Society to undertake the prosecution of such matter. The Board of Directors shall carefully consider such report and a two-thirds vote of all the directors shall determine whether or not such prosecution shall be undertaken.

**Article XVIII**

**General Meetings of the Society**

SECTION 1. The General Annual Meeting shall be held each year during the month of March. An additional General Membership Meeting shall be held in the month of October of each year. Special meetings may be called at any time by the Board of Directors.

**Business Transacted at General Meetings**

SECTION 2. No business shall be submitted to the General Annual Meeting, unless it has been brought to the knowledge of the Board of Directors at least eight days in advance. The General Annual Meeting shall, however, be entitled in any event to lay aside any such business as it may consider inopportune.

**Motion or Resolution in Writing**

SECTION 3. Every motion or resolution which shall be made or offered at any meeting of the Society shall, at the request of the Secretary, be reduced to writing and furnished to the Secretary before the question shall be put.

**Article XIX**

**Notices**

SECTION 1. Whenever notice is required to be given to any member, such notice shall not be required to be given by personal service, but such notice shall be deemed to have been given from and at the time when said notice in writing shall have been deposited in the Post Office, or in any regular United States mailing box in the City of New York, enclosed in a post-paid wrapper, addressed to the member at his last known place of residence, as the same shall appear upon the books of the Society, or if such address shall not appear upon the books of the Society, then to such address as may appear in any directory of the municipality in which he may reside or do business.

## **Article XX**

### **Expulsion and Termination of Rights of Membership Suspension for Cause**

SECTION 1. Any member who is expelled by the Board of Directors, or who is dropped for the non-payment of dues, fines or assessments, shall thereupon lose and forfeit any and all interest, right or claim in, to or under the Society, the property thereof, and the dues and assessments paid thereto. Upon expulsion, death, bankruptcy, insolvency or other severance of membership in or connection with the Society, all rights and interest of whatsoever character, sort or kind, to, of, in or concerning the Society by virtue of such membership, shall instantly cease and be of no further force and effect. Expulsion shall not relieve any member from his obligations to the Society up to the date of such expulsion.

### **Posthumous Membership**

SECTION 2. On the death of any member his rights in the Society and membership shall cease and neither his rights nor his membership nor any right therein shall at any time be, by voluntary assignment, operation of law, legal proceedings or otherwise, vested in any other person whomsoever; provided, however,

That in the sole discretion of the Board of Directors the heir, heirs, or next of kin of a deceased member may be awarded a share in royalty distributions not exceeding that which would, in the judgment of the proper Classification Committee, have been awarded to the deceased member had he been living at the time of such royalty distribution.

### **Bankruptcy of Member**

SECTION 3. The Board of Directors shall have the right to suspend payments of royalties to any member in case of the filing of a petition in bankruptcy by or against him, and/or the adjudication of such member a bankrupt, or the execution by such member of an assignment for the benefit of creditors, or the taking advantage by him of the insolvency laws of any State, Territory or Country, or the appointment of a receiver, trustee or liquidator of the assets and property of the member, or the voluntary or involuntary dissolution of a member.

The representative of any member of "Music Publishers" class who shall be a member of the Board of Directors shall immediately upon the happening of any such contingencies be dropped from the Board of Directors.

The royalties, or the right to participate in the royalties, and the rights of the members in the Society, shall not be sold or otherwise disposed of by any member, and shall not be the subject of sale or other disposition by voluntary action, operation of law, legal proceedings or otherwise, and no member shall sell, otherwise dispose of, hypothecate or create a lien upon any royalties accruing, or that may thereafter accrue to him, by virtue of his membership, or any of the rights, privileges, benefits, royalties or emoluments to which he may be entitled by virtue of his membership.

## **Article XXI**

### **Amendments**

These Articles may be amended by a vote of two-thirds of the members present at any meeting of the Society held for the purpose of voting on such amendment.

[FLORIDA STATUTE]

**SENATE BILL NO. 679**

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors, or assigns, to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

*Be It Enacted by the Legislature of the State of Florida:*

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself of its members or other interested parties for any use, or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors proprietors, managers, owners or representatives thereof, who render or cause to be rendered



ately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or in-



instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein-declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus; or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$9,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or re-



representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void; such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

## AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

THIRTY ROCKEFELLER PLAZA  
NEW YORK CITY

January 15, 1936

Isle of Dreams Broadcasting Corporation  
Radio Station W.I.O.D.  
Miami Beach, Florida

Gentlemen:

It is mutually agreed that the certain license agreement between us, dated Sept. 20, 1932, effective September 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

and Article 8 is amended by striking out therefrom subdivision (a) and (b).

Very truly yours,

AMERICAN SOCIETY OF COMPOSERS  
AUTHORS AND PUBLISHERS

By..HERMAN.GREENBERG.....

ACCEPTED:

ISLE OF DREAMS BROADCASTING CORPORATION

By..P. READER.....

Title Treasurer

Dated.....



**MEMORANDUM OF AGREEMENT** between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (hereinafter styled "SOCIETY"), and ISLE OF DREAMS BROADCASTING CORPORATION, (hereinafter styled "LICENSEE"), as follows:

1. SOCIETY grants to LICENSEE, its successors and assigns, and LICENSEE accepts for a period of three (3) years from September 1st, 1932, a license to publicly perform by broadcasting from Radio Station W. I. O. D. located at Miami Beach, Florida non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a place or from a source which SOCIETY does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

- (a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 3 hereof shall be adjusted.
- (b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, SOCIETY shall refund to LICENSEE pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of ONE THOUSAND AND no/00 Dollars (\$1000.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

- (a) For the first year of the term hereof, a sum equal to three percent (3%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities, and,
- (b) For the second year of the term hereof, a sum equal to four percent (4%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities; and,
- (c) For the third year of the term hereof, a sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities.
- (d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to LICENSEE for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by LICENSEE).

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of account.

ing as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to indemnify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands, or suits that may be made or brought against the LICENSEE with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in SOCIETY'S repertory heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall forthwith give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall co-operate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against LICENSEE on account of the rendition of any musical composition contained in the SOCIETY'S repertory but NOT heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

IN WITNESS WHEREOF, this agreement has been duly subscribed by SOCIETY and LICENSEE this 20th day of September, 1932.



AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD

ISLE OF DREAMS BROADCASTING  
CORPORATION

Licensee.

By JESSE H. JAY  
President.



## Exhibit "G"

85  
FLA-1-42  
M.P.-B

(THEATRES)

**MEMORANDUM OF AGREEMENT** between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and MARIANNA THEATRES, INC. (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing November 23rd, 1936 a license to publicly perform at the Ritz Theatre in Panama City, Florida, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Licensee warrants and represents to Society that the statements made in the application dated 11-25-36 for this license are true and correct, upon which warranty and representation the license fee herein is fixed. 810 seats.

5. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "5", there shall be made to the Licensee a pro rata refund of any unearned license fees.

6. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

7. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

8. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

9. Licensee agrees to pay Society for the license herein the sum of One Hundred and Twenty-One Dollars and Fifty Cents (\$121.50) annually, payable semi-annually in advance in installments of Sixty Dollars and Seventy-Five Cents (\$60.75) each.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 28th day of November, 1936.

In Triplicate.



AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD.....  
Agent and Attorney in Fact

MARIANNA THEATRES, INC.

By A. E. ADAMS.....  
V. Pres.

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**MEMORANDUM OF AGREEMENT** between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and THIRTY ONE WEST ADAMS STREET CORPORATION (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing December 1, 1936 a license to publicly perform at Carling Hotel, Jacksonville, Florida, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of Two Hundred Forty and no/100 Dollars (\$240.00) annually, payable in quarterly installments of \$60.00 each, in advance.

This contract includes musical performances other than by means of master controlled radio receiving sets in hotel guest rooms for which a separate license is issued.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 8th day of January, 1937.

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD  
Agent and Attorney in Fact  
THE CARLING HOTEL

By CHAS. B. GRINER, Mgr.



[fol. 87] *Duly sworn to by Gene Buck. Jurat omitted in printing.*

[fol. 87½] [File endorsement omitted]

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—Filed February 7, 1938

Having considered the Bill of Complaint and the affidavits of Gene Buck, Walter S. Fischer, Gustave Schirmer, Saul [fol. 89] H. Bornstein, Deems Taylor, Anne Paul Nevin and Ella Herbert Bartlett, all duly verified and filed in the above entitled suit, and the motion of the plaintiffs for a temporary injunction herein, and their request that the same shall be heard and determined by three Judges of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and being fully advised of the law and the facts, and it appearing therefrom to be a proper case therefor, now therefore, it is

Ordered, and this does order:

1. Plaintiffs' application for a temporary injunction filed herein on February 7, 1938, be and the same is hereby set for hearing before the Court at the Courtroom thereof of the Federal Building at New Orleans, La., at the hour of 10 o'clock in the morning of March 3, 1938;

2. That the Honorable Rufus E. Foster, a Judge of the Circuit Court of Appeals for the Fifth Circuit, and the Honorable Louie W. Strum, one of the Judges of the above entitled Court, be and they are hereby called to my assistance to hear and determine said application for temporary injunction at said time and place; and

3. That written notice of the time and place of the hearing on said application for temporary injunction be given to the Honorable Fred Cone, the Governor of the State of Florida; the Honorable Cary D. Landis, Attorney General of the State of Florida, and to such other persons as may be defendants in the suit, at least five (5) days before the date of said hearing.

Done, February 7, 1938.

A. V. Long, United States District Judge, Northern District of Florida.

[fol. 94] **Affidavits in Support of Motion for Temporary Injunction**—Filed February 7, 1938

IN UNITED STATES DISTRICT COURT

[Title omitted]

**AFFIDAVIT OF GENE BUCK**

Gene Buck, being duly sworn, deposes and says:

I am an author and have been such for over twenty years.

I am a member, director and President of the American [fol. 95] Society of Composers, Authors and Publishers, (hereinafter referred to as the "Society"), and am familiar with the facts set forth in the bill of complaint herein.

I have a wide and extensive familiarity with the music business as well as the theatrical business.

My own experience goes back to the days of Florenz Ziegfeld. I wrote over twenty "Follies" for him as well as sixteen "Midnight Follies" produced by Ziegfeld, and some other plays. I wrote the lyrics as well as a substantial part of the book for his "Follies". I wrote the lyrics for a great many musical compositions that were published in the past twenty years, some of which had a wide vogue and celebrity:

I am personally acquainted with practically all of the important members of both professions and know their problems and struggles for the past quarter of a century.

In 1930, I was elected President of the Society.

This motion is made on behalf of the complainants herein and others similarly situated, for a temporary injunction to restrain the defendants herein from enforcing Senate Bill No. 679, enacted by the Legislature of Florida, and signed by the Governor of that State on June 9th, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute").

The reason that a temporary injunction is asked for is that the enforcement of this Statute, if not restrained by this Court, will result in such terrific hardship to myself, to the other complainants herein and to others similarly situated, that no possible redress can be had.

This State Statute is aimed at, and actually will succeed in destroying, the rights of complainants and others simi-

[fol. 96] larly situated, in their copyrighted musical compositions, and will enable the users of such compositions in the State of Florida to make free use of these works, without compensation.

In order to avoid unnecessary repetition, and in the interest of brevity, I shall not repeat the allegations already made in the bill of complaint, and I make the bill of complaint herein a part of this affidavit, and ask that it be considered by the Court with the same force and effect as if the facts therein stated were repeated by me in this affidavit.

I shall confine myself in this affidavit to amplifying the allegations of facts set forth in the bill of complaint, particularly with a view to setting forth the facts which compel the complainants and others similarly situated to combine for the purpose of protecting their copyrights in musical compositions against infringement by means of unauthorized public performance for profit, and to license the use for public performance for profit of the catalogues of complainants and others similarly situated, and I also desire to show by this affidavit why the requirements of the Statute would impose a hardship upon complainants and others similarly situated, as well as upon honest users of copyrights who desire to respect our rights, and the necessity for granting licenses to users at a single fee fixed and determined by the Society, acting on behalf of all its members and members of affiliated societies, in negotiations [fol. 97] with users or their respective trade associations. Such licenses will be referred to hereinafter as "blanket licenses." Such licenses enable users to have available at all times a reservoir of musical compositions on which they may draw instantaneously and at will without the necessity of endless negotiations with individual copyright proprietors.

The Society is an unincorporated non-profit association organized in 1914 for the purpose of protecting composers, authors and publishers of musical works against infringement of their copyrighted works, and to grant licenses for the public performance of such works for profit.

Prior to the organization of the Society, composers and authors received no compensation whatsoever from the performance of their works in night clubs, cabarets, dance halls, hotels, motion picture theatres and other places of



public amusement and entertainment; the proprietors of these places, (hereinafter referred to as "users") profited from the performance of the works of these composers and authors and disregarded the United States Copyright Law, which, since 1897, granted protection to authors and composers against such unauthorized performances; such performances, especially with the advent of radio, seriously diminished the earning power of composers and authors by diminishing the number of persons attending the performance of their works at legitimate theatres, diminishing the sales of sheet music and diminishing the sales of phonograph records and music rolls, from which sources alone composers and authors received their income; the users of music combined into powerful trade associations to deprive composers and authors of any royalties from performance of their works in places of public amusement and entertainment [fol. 98] ment; a single composer or author is unable to protect his rights because of the tremendous number of places where his works are performed simultaneously throughout the United States, which performances are fleeting, momentary and fugitive and cannot be detected unless a paid investigator is employed to ascertain the infringements occurring at such places; the Society has protected composers, authors and publishers of musical works against such infringement, and has supplied a means through which users of copyrighted works may readily secure a license and thus perform lawfully any of a vast number of works required for the purpose of presenting a pleasing, attractive and diversified program; but for the existence of the Society the users would refuse to pay any royalty whatsoever to composers and authors for the use of their works for the private profit of such users; the royalties charged by the Society for the use of the works of 45,000 composers and authors scattered throughout the world is nominal in comparison with the income derived by such users from the exploitation of such musical works.

• The Right of Public Performance of Copyrighted Works Licensed by the Society Is Granted by the Congress Pursuant to the Constitution of the United States

Article 1, Section 8 of the Constitution gives Congress the exclusive power

"To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The Copyright Law of 1897 granted to authors and composers the exclusive right to perform their copyrighted musical compositions publicly for profit.

[fol. 99] The Society Acts as a Clearing House to Serve the Convenience of Users, as Well as to Protect Composers, Authors and Publishers.

A user cannot lawfully perform a copyrighted musical composition for profit without the consent of the copyright owner.

The successful presentation of a musical program at a dance hall, cabaret, night club, motion picture theatre, hotel, restaurant or radio broadcasting station requires from 15 to 104 musical compositions in a single hour or a single evening. Each hour or each evening requires not only different musical numbers but different types of music. (Musical compositions are divided roughly into popular works, production works and standard works.)

Since copyrights obtained in foreign countries are respected in the United States under reciprocal treaties with such countries, the user of music may not play the works of composers and authors residing abroad without their consent.

There are upwards of 30,000 establishments daily and hourly performing the copyrighted works of both American and foreign composers and authors.

In view of the obvious need of users of music to be able to play a given number at a moment's notice without negotiating for the consent of a particular composer or author, the users require this reservoir of music to avoid individual bargaining, and the creator of music cannot bargain for the licensing of the performance of an individual number unless he is able to offer to the user a license to perform a sufficiently large, varied and diverse program in order to [fol. 100] enable the user to present to his public a composite program suiting the taste and fancy of the particular listeners.

The works of a writer of standard music have no value for the purpose of public performance unless they can be interspersed with popular numbers and production numbers.

If a radio station limited its broadcasts to the compositions of a particular composer or to a particular class of musical compositions that composer or that class of compositions would soon find that the public would absolutely refuse to listen.

Nothing on earth can change the human desire for variety in music as well as in other fields of entertainment.

The Society performs a very useful and necessary function as a clearing house through which users of copyrighted music may secure a license to use such music without the necessity of seeking out each individual copyright owner or the owner of the right to perform publicly for profit. Such owner may be a composer, author or publisher, or some third party. It is impossible to secure in advance the consent of all the copyright owners whose works are performed in these places of public entertainment.

Prior to 1914, the copyrighted works of composers and authors were being performed for profit by users located throughout the United States, including the State of Florida, without any payment whatsoever to the writer.

The writer because of his very modest means, was unable, acting individually, to secure redress against unlawful performance of his works although such performances were in direct competition with the legitimate stage performances [fol. 101] from which, (together with royalties from sales of sheet music and mechanical reproduction), the writers derived their livelihood.

These illegal performances were multiplied in every part of the United States, including each of the Counties in the State of Florida. The illegality of such performances was extremely difficult to establish and prove, unless a trustworthy and responsible person, located in the vicinage where such illegal performances took place, was on hand to witness and hear same and to notify the infringer of his unlawful act, coupled with a demand to desist from such further unlawful performances.

Prior to the organization of the Society, piracy was the accepted custom. No one paid for the non-dramatic public performance of copyrighted works for profit.

As against the meager resources of the individual writers and publishers, unorganized as they were, the users were organized into trade associations whose chief objects were to resist demands of writers and publishers of music that their performing rights be recognized and respected, and

to defend by the paid counsel of each such association those of their members who might be sued for piracy.

Under the pressure of these economic conditions, a group of composers which included Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, myself and others, with a very few publishers, organized on the 13th day of February, 1914, the Society, principally for the protection of writers and publishers of musical works [fol. 102] against the infringement of their performing rights in their copyrighted works in all countries of the world, and for the granting of licenses for and on behalf of its members to perform for profit such works and to collect royalties for such licenses; the membership of the Society was and is limited exclusively to and is composed entirely of composers, authors and publishers of musical works; the royalties collected for and on behalf of the members by the Society from licenses to play the works of its members are distributed among its members exclusively in accordance with a scheme of allotment of royalties provided for in its Articles of Association, a copy of which is annexed to the bill of complaint.

A part of the royalties accruing to the member of the Society collected from the users is, pursuant to the Articles of Association, devoted to the support and maintenance of the widows and orphans of deceased members and of members that have become indigent, infirm, aged and decrepit.

Since the formation of the Society, no author or composer of music has been buried in a pauper's grave or permitted to famish, or his family to famish, which conditions existed prior to the formation of the Society while the users were capitalizing and using his works for their unjust enrichment and advantage.

The Society continually extends financial aid to those who have written or are dependent upon the writers of successful musical works, in the payment of life insurance premiums, the saving of homes from foreclosure of mortgages, the payment of hospital bills, the succour of the living and the burial of the dead. None of these people ever received [fol. 103] or ever would have received a dollar from the users and commercial broadcasters who prospered commercially because of the use of the works resulting from the creative genius of these people.



## Economic Conditions Necessitating the Organization of the Society

The Society was organized under the necessities of the situation arising out of the new style of entertainment offered to the public in restaurants, hotels, inns, and other public resorts. To induce the public to patronize these places and to acquaint the public with the fact that a musical program was the distinctive feature and main attraction of the establishment, these entertainments were widely advertised under the names of "cabarets", "tea dansantes", "after-theatre revues", "midnight revues", "dinner dancing", "dinner and music" and similar slogans. While no special admission fee was charged for these entertainments, it was expected that those who patronized them would purchase food and drink. In some establishments "convert" or other charges were added to the patron's check. The patrons paid for the entertainment by a direct or indirect charge, and the entertainment was given for direct or indirect profit.

The cabaret or revue entertainment consisted of the rendition of music and the singing of songs and dancing to the accompaniment of music. In some of the establishments, the performances were given in make-up and costume, and on a platform or stage. The entertainment was advertised in the daily newspapers in the same manner, mode and means as regular legitimate attractions playing [fol. 104] at first-class theatres, which paid the authors and composers a license fee or royalty for the use of their works.

In its most developed form, the cabaret or revue is a regular show, with appropriate intermissions indicated by a suspension of action instead of lowering a curtain.

Cabaret, motion picture and vaudeville shows and revues were presented in nearly every city in the United States, the dominant, distinctive, and principal features of each such entertainment being the vocal and instrumental numbers of the current grand and comic operas, musical plays, as well as standard and popular compositions.

A leading and attractive feature of the larger hotels in the United States was the orchestra and the musical and dance program.

Dance halls which relied entirely for their operations upon music sprang up like mushrooms in every part of the United States. A direct admission fee was charged at the

door of these dance halls; in some instances there was a hatcheck, in others, a specific charge of so much per dance.

Motion pictures were coming into prominence as a form of entertainment, and theatres devoted exclusively to the showing of motion pictures were erected in every city and town and village in the United States, and, of course, music and musical attractions played a very important part in such class of entertainment.

All these places of public entertainment were dependent almost entirely for their success upon the songs and instrumental numbers of the composers, authors and publishers. But no proprietor expressed a willingness to, nor did he pay a fee, royalty, or other compensation to the owner of [fol. 105] the works. On the contrary, proprietors of these resorts helped themselves to the current works without the leave or license of the copyright proprietors, completely ignored them and their statutory rights in their property, upon the ground that musical performances given by them were not for profit, because they were given without direct admission fee, or that music was merely incidental to the operation of the premises, and for that reason the performances were not subject to the control of the copyright proprietor.

The writers and publishers realized that their works were exploited by others and were used for profit and not only that, but in some instances the performances were in direct competition with those given by legitimate theatrical managers who did pay performing royalties to the writers whose works were used. The creators of these works justly felt that they were entitled to participate and share in a modest way in the profits and revenues made possible by the exploitation of their works.

A single writer or publisher was and is helpless in dealing with these infringers for the following reasons:

As an individual, he could not protect his rights as against the tremendous commercial enterprises which would appropriate it to their use without any compensation to him.

The several groups of users of music were organized in trade associations and were prepared to use the resources of their organizations in resisting the effort of any individual composer to enforce his performing rights, while the composers and publishers were mostly men of humble and moderate income, who were not able, singly, to bear the expense of ascertaining and investigating the piracies and [fol. 106] of protracted and numerous litigations.

Moreover, the use made of copyrighted music in these places was in the form of musical programs in which the works of a number of composers were combined.

The performances, as a rule, were fleeting, and unless the infringement was detected and established the moment it occurred, proof thereof was well-nigh impossible.

A single entertainment amounted to a composite infringement of a number of compositions of several composers. In the course of a year, the proprietor of a single establishment would violate the rights of hundreds of composers and copyright proprietors, and each of these was a victim of a number of piracies.

Piracies were committed in numerous establishments and in various parts of the United States, and the expense of locating and securing the evidence of the piracies was prohibitive for the individual writer or publisher. Separate actions for each act of piracy would involve a multiplicity of litigations.

The piratical practice, having in this way a collective effect, collective and protective action by the writers and publishers was natural and necessary.

There was this further element to urge organized action. The practice grew in leaps and bounds. The resorts where musical works were performed extended to every city and to every part of every city. Motion picture theatres added musical programs to their performances, and their number grew so fast that in a few years the industry connected with motion picture shows became one of the largest industries in the United States. At the present time there are over [fol. 107] 16,000 such theatres, attended by more than 80,000,000 patrons each week.

In many motion picture theatres vaudeville has been displaced by a form of musical and dramatico-musical presentation. The stage performance often takes an entire hour and such stage performance is advertised in many instances as the main attraction at such motion picture theatres. Indeed, many patrons of motion picture theatres attend merely for the musical presentation.

The box office receipts of some of these theatres have averaged over \$100,000 for a single week.

In addition, many regular theatres have been converted into so-called cabarets or night clubs, giving regular ambitious stage performances in the same manner as legitimate theatres.

In view of the multitude of places where his rights were being infringed (including places located in each of the Counties in the State of Washington), it was impossible for an individual composer to ascertain and prosecute even a small number of the piracies.

Without the collective action of at least a certain number of writers and copyright proprietors, the performing rights secured by the copyright law remained without effective protection. It became evident that unless composers and copyright proprietors organized in sufficient number to provide mutual aid and the necessary funds for the protection of their rights against an army of pirates, most of whom were banded together in trade associations for the express [fol. 108] purpose of making piracy a safe practice, all the rights granted by the law to copyright proprietors would be nullified.

Furthermore, an organization of the composers, authors and copyright proprietors was necessary to meet the demands of users, who, in compliance with law, desired to obtain licenses to use copyrighted songs and music and were willing to pay compensation for the use of such works.

No place of public amusement could carry on its musical entertainment by confining its program exclusively to the works of a single composer. Programs had to be attractive, pleasing, international and diversified, and had to present the current songs and instrumental numbers that were in vogue or were the reigning "hits" of the day—those that had received popular acclaim, or appealed to the whims, taste and fancy of their patrons.

A dance hall required an average of 81 tunes for its nightly program, and the other places of public entertainment from 15 to 104 separate and distinct numbers of different composers. In other words, the program, to be entertaining, had to be composite.

The organization was necessary because of the hardship and inconvenience imposed upon users and commercial broadcasters in securing the consent of individual writers and proprietors whose works they wished to include in their programs. Writers and publishers were scattered throughout the United States and in foreign countries. Required to deal with them as individuals, there was no possibility of finding them and procuring licenses, without difficulties, which, in the great majority of cases, were insuperable. Under these circumstances, copyright infringement and its



[fol. 109] consequences were unavoidable. It was obviously to the advantage of the users located in various parts of the United States, including users located in the State of Florida, to deal with an association of writers and copyright owners who, unless thus organized, could not be found.

The value, both to the author, composer and publisher, as well as to the users and commercial broadcasters, of such an organization was proven by the experience abroad. Similar societies had been organized and were functioning in France, England, Italy, Austria and Germany.

In France, in January 1851, there was organized a society known as "Societe des Auteurs, Compositeurs et Editeurs de Musiques", the purpose of which was to protect composers, authors, and publishers of musical works against piracies of any kind, and to grant licenses and collect royalties for the public performance of the works of its members. That society conducted its operations and activities to the mutual advantage of all parties interested, and said French society served as the model for the Society.

Under the scheme of organization of the Society, the publisher did not and does not now enjoy any right in the work superior to that of the composer or author thereof, insofar as the Society is concerned. The writer and the publisher shared and now share equally in the royalties or license fees derived from the exploitation of the performing rights.

At the outset the users of copyrighted music refused to recognize the rights of public performance, and the national, state and city associations representing the users of copyrighted music informed the Society that they would resist [fol. 110] to the utmost any attempt to prevent their members from using copyrighted songs belonging to members of the Society, and that they would under no circumstances permit any of their members to take out licenses from the Society or to treat with it in any way.

### Hotels

The owners of hotels consistently refused to pay for the use of music until the United States Supreme Court decided that the performance of copyrighted music in hotels was a performance for profit, since the music was used as an inducement to bring patrons into the hotel (Herbert v. Shanley, (1917) 242 U. S. 591).

In that case, Victor Herbert and his collaborators were the composers and owners of a comic opera called "Sweet-

hearts", then given by Klaw & Erlanger, theatrical managers, at the New Amsterdam Theatre, in New York City, under Herbert's license. The Shanley Co., operated a cabaret wherein they caused to be sung the leading song features of such opera accompanied by an orchestra. There was no charge at the door, but patrons were obliged to pay a so-called cover charge, which was fixed at \$2 per head. As a matter of fact, this cabaret was competing with the licensed legitimate stage production.

Justice Holmes, declaring such performance an infringement of the copyright, said, at page 594:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly [fol. 111] that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. \* \* \* If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

Many of these hotels have been in competition with legitimate productions. Their advertisements disclose the fact that they do not stress the quality or merit of food or services or the desirability of their hostelry, but rather call to the attention of the public their floor shows, orchestras and other forms of musical entertainment. The interest of the public is sought to be stimulated and attracted by these facilities.

#### Motion Picture Exhibitors

After the decision in *Herbert v. Shanley*, in 1917, while the hotelmen made some effort to work out an agreement with the Society, the motion picture theatre owners, through their trade associations, refused to concede that the decision was applicable to the playing of copyrighted music in motion picture theatres. They declared that no direct admission fee

was charged for hearing the music and that the music was incidental to the entertainment.

It was therefore necessary to test out the issue as to the applicability of the copyright law to that newer type of public amusement. The Motion Picture Theatre Owners [fol. 112], of America challenged the rights of the society and a test suit was brought by Raymond Hubell (a member of the Society) against the Royal Pastime Amusement Co. a motion picture exhibitor) for the playing of Mr. Hubbell's song, "Poor Butterfly", which was a feature and "hit" of the then current New York Hippodrome production, from which Mr. Hubbell had been deriving a performing royalty.

The action was defended by the local trade association. The case was decided in favor of the plaintiff, in a decision rendered May 31, 1917 (242 Fed. 1002), the court holding that the copyright law applied to motion picture theatres.

Although the motion picture exhibitors presented elaborate stage performances, which often took as much as an hour and more, and were advertised as the main attraction, they refused to pay anything to the authors.

The Motion Picture Exhibitors League of America went so far as to adopt, in April 1917, a resolution which read:

"That the organization undertake legal defense of any exhibitor against whom action is brought by the American Society of Composers, Authors, and Publishers, to apply to nonmembers as well as members."

The Motion Picture Exhibitors League of America's activities did not deal with the matter of procuring funds to combat the Society only, but brought an action at its own cost and expense and with counsel supplied by it, in the name of one of its members, the 174th Street & St. Nicholas Amusement Company v. George Maxwell, as president of the Society and its Directors (169 N. Y. Supp. 895) to restrain the Society from conducting its operations, from act- [fol. 113] ing in concert to demand fees as a condition precedent to the paying of musical compositions, from using the funds of the defendant Society in furtherance of its objects, and enjoining its directors and officers from meeting, with any purpose to act in combination or concert, upon the ground that the defendants were a monopoly in restraint of trade. In this action it failed, the court saying:

"\* \* \* The fact that the music of the authors who are members of the association is popular and in demand pre-

sents just so much more reason why it should be protected, and its unauthorized use at public entertainment given for profit prevented. Practically the exhibitors of moving pictures seek to obtain by injunction the right to publicly perform copyrighted musical compositions for profit, without a consent of the holder of copyright, and without compensation to him."

### Radio Broadcasters

With the development of broadcasting in 1922, there was a new invasion of the rights of the authors. Radio took the most popular musical hits of the day, and by constant grinding and repetition of songs, acted as a veritable inferno, greatly shortening the life of a song and ruining the sale of sheet music and phonograph records, from which the authors had previously derived the major part of their royalties. In spite of this great injury to the author's works, the radio broadcasting stations refused to make any payment to authors. The National Association of Broadcasters issued the following proclamation:

"To publishers of dance, jazz, blue, and popular music: The members of this association maintain that they will not pay for licenses from any copyright owner or recognize the right to collect any tax until the law plainly states that such payment must be legally collected."

[fol. 114]. The challenge of the broadcasters was accepted by the Society and a suit was brought in behalf of a member, M. Witmark & Sons, against Bamberger & Co., in the United States District Court of New Jersey, to restrain a department store dealing in radio products from broadcasting the plaintiff's copyrighted music. Judge Lynch in that case held that radio broadcasting was a public performance for profit (291 Fed. 776).

Notwithstanding the decision in the Witmark case, the broadcasters refused to respect the rights of authors. Thereupon, Jerome H. Remick & Co. brought a suit in the District Court of Ohio against the American Automobile Accessories Co. (owned by the Crosley Manufacturing Co., which was engaged in selling radio accessories and equipment) for infringement of the musical composition by radio broadcasting. Although the district court dismissed the suit, the rights of the copyright owners were upheld by the Circuit



Court of Appeals in an opinion by Judge Mack in 1925 (5 Fed. [2d] 411). Certiorari was denied by the Supreme Court.

Broadcasters and hotel owners continued to challenge the rights of copyright owners to be paid for the broadcasting of their works as late as 1931, when the United States Supreme Court held that a hotel which picked up a program of copyrighted music emanating from an unlicensed broadcasting station must pay the copyright owner (*Buck v. Jewell-LaSalle*, 283 U. S. 191).

The Statute Complained of is Part of a Deliberate Program on the Part of Users to Place Composers at the Mercy of Users

[fol. 115]. William S. Hedges, chairman of the executive committee of the National Association of Broadcasters, in the hearings before the Congress on H. R. 12549 (Jan. 28, 1931), at page 44, declared:

"It is unnecessary to direct attention to the fact that music is, in the main, the raw material from which broadcast programs are constructed and is, therefore, almost the lifeblood of the broadcasting business."

The National Association of Broadcasters has laid out a program with which to combat the association organized for the protection of song writers. In respect of this, the NAB Bulletin, February 18, 1936, entitled "Report on Copyright", states (p. 19):

"3. The only occasions in the past on which ASCAP has seemed really willing to negotiate have been when by reason of developments on other fronts the broadcasting industry seemed on its way toward achieving a measure of progress toward bargaining equality.

"A corollary conclusion is that, to have any hope of success, the broadcasting industry must concentrate on removing so far as possible the obstacles which have been enumerated under the previous subheading. Such a program includes litigation, legislation, the establishment of an independent source of music supply, doing away with the discriminatory ASCAP contracts, eliminating the objectionable features from network-affiliate contracts, and any and all steps and proceedings necessary to these ends."

The implication of this extraordinary statement is that by means other than ordinary negotiation, it has forced the Society to accept terms and fees of licenses dictated by the NAB and its members. Those methods were threats of numerous and costly lawsuits, hostile legislation and various campaigns to harass, vex, and annoy the Society, and [fol.116] to put it to large expense to aggressively resist the attempts to destroy it.

This policy was not new, novel, or original with NAB. The motion picture theatre owners had pursued a similar policy.

Separate suits in State courts were instituted by members of each association for the purpose of preventing the Society from carrying on its activities in each such respective State. These suits were sponsored by the respective associations. Complaints were filed with the Federal Trade Commission and with the Department of Justice of the United States.

The Society, having been thoroughly investigated by these two agencies of the Federal Government, was given a clean bill of health.

The Federal Trade Commission, in dismissing the charges on January 2, 1923, said:

"The chief reason for this conclusion may be stated as the fact that the making of a claim for royalties, apparently in good faith, cannot be said to constitute 'an unfair method of competition in commerce'."

The Department of Justice, in dismissing the charges on August 6, 1926, said:

"A thorough and comprehensive investigation was made of the organization and operations of that society. Several special agents of the Bureau of Investigation were engaged in that investigation and it was conducted almost continuously for a period of about 2 years. The Society has been advised that the Department saw no reason for proceeding against it under the antitrust laws on account of its operations in collecting licenses for the public performances of copyrighted music from the owners of motion picture houses, of hotels, of dance halls and of similar places where copyrighted music is publicly performed for profit.

[fol. 117] "It was found that the rights conferred under the Copyright Act by Congress on the owners of copyrighted music had repeatedly been held by the Federal courts to be violated by the unlicensed performance of such music, in amusement where the performance of the music constituted at least part of the public entertainment from which the owner of the place of amusement derived profit through the charges made to his patrons."

In respect of the New York State court suit, that court, in dismissing the action, held (169 N. Y. Supp. 895):

"The fact that the music of the authors who are members of the association is popular and in demand presents just so much more reason why it should be protected, and its unauthorized use at public entertainment given for profit prevented. Practically the exhibitors of moving pictures seek to obtain by injunction the right to publicly perform copyrighted musical compositions for profit, without a consent of the holder of copyright, and without compensation to him."

The broadcaster, having secured a license upon terms entirely satisfactory to him, saw no reason for prosecuting such suit any further.

A flood of bills was introduced into the Congress for the purpose of exempting broadcasters, exhibitors, and hotel owners from any liability in respect of the public performances of musical works for profit. Extensive and exhaustive hearings were held thereon and all failed of passage.

The Society, having submitted to the exactions of these users and acceded to their demands, these activities of the users both in respect of litigation and legislation, thereupon ceased until shortly prior to the expiration of licenses between users and the Society.

Beginning with 1934, threats were made by the responsible officials of the NAB (representing practically all of the radio broadcasting stations in the United States, including the broadcasting stations in the State of Washington enumerated in the complaint herein), that unless the Society renewed its existing licenses upon the same terms and conditions, the Society would be subjected to a barrage of hostile legislation and institution of suits and the filing of complaints with the Department of Justice.

About the same time, a three-point program of activity was begun by the NAB which included litigation against the Society and the securing of copyright modification of the composers' and authors' rights. The membership was asked to contribute 10 per cent of the payments made to the Society as a war chest, with the slogan "10 per cent now or 300 per cent in 1935."

To carry out the program:

"Large contributions were sought from and made by independent stations as well as by the networks and Levy, for the carrying forward of the program of which this was an integral part" (p. 6 NAB Special Report, Feb. 18, 1936).

The Society, having refused to submit to these species of extortion, the following steps were taken:

The broadcasters, through one of their members, instituted a suit for the dissolution of the Society (Pennsylvania Broadcasting Co. v. Buck), now pending in the United States District Court for the Southern District of New York.

A suit was commenced by the United States Government, in the United States District Court for the Southern District of New York, pending at the present time.

[fol. 119] A suit was instituted in 1935 by the State of Washington, in the Superior Court, Thurston County, for a dissolution of the Society, in which a receiver was appointed. The result of such suit was that during the pendency of that litigation, the Society received absolutely no revenue from the use of the works of its members throughout that entire State. The suit was subsequently dismissed on the merits, on July 6, 1936, by decree, which is annexed hereto as Exhibit "I".

Prior to the dismissal of the Washington State suit, copies of the papers in that suit were reprinted by the NAB and sent to each member. In respect of this activity, the Cincinnati Bill Board (Feb. 15, 1936) observes:

"It is believed that this move on the part of James W. Baldwin, managing director of the NAB, is an effort to help along similar moves in States that have laws like those of Washington, or those that desire to seek such legislation.

"Portland, Oreg., February 8.—Group of broadcasters here were told by a Washington authority that certain laws of the State are similar to those of Washington and suitable for a monopoly suit against A. S. C. A. P."



The pendency of the Government suit has been used as a justification and defense for piracy by many users performing the compositions of the Society's members.

Certain members of the NAB holding licenses from the Society have furnished inaccurate and misleading returns, resulting in very substantial losses to the members of the Society.. The shortage ranges from \$2,400 to \$40,000 in respect of certain stations.

Foreign-government-controlled and noncommercial radio stations pay composers more for music than do American [fol. 120] commercially operated stations.

In the report of Judge Parker, a Commissioner appointed by the Canadian Inquiries Act, dated the 29th day of October, 1935, he says (p. 35):

"Taking the number of radio receiving sets in the United States and the gross revenue derived by the American Society of Composers, Authors, and Publishers from the American broadcasting stations, the rate per receiving set works out at about 9½ cents.

"The Canadian Performing Right Society, Ltd., in arriving at the basic fee of 10 cents per receiving set in Canada had regard to the rates charged in other countries, giving the following examples:

	Cents per Set
"Denmark	13
Great Britain	7¾
Australia	30
United States	9½
Germany	9
Austria	10½
Norway	16
Czechoslovakia	10
France	5
Finland	5
Italy	13"

It must be borne in mind, however, that in none of these countries are the stations operated commercially; that is, time on the air is not sold to advertisers. The sole revenue derived by the governments is from the licensee fees col-

lected from receiving sets, out of which a proportion thereof is paid to the Performing Right Society operating in that particular country.

It must further be borne in mind that in none of these countries do the radio stations serve such coverage areas, embracing as many families, owning as many radio sets, and such potential listening audiences as American stations enjoy. This is illustrated by an advertisement appearing in *Variety*, February 19, 1936:

"As the Most Powerful Station in Philadelphia and as the Oldest.

"WCAU was the first Philadelphia station established exclusively for radio advertising. As the only Philadelphia unit of the Columbia Broadcasting System WCAU serves a primary coverage area in which there are 1,429,124 families, of which 1,312,011, or 91.7 percent, own radio sets. A potential listening audience of 4,592,038. WCAU, 50,000 watts, Philadelphia, Pa.

Robert A. Street, Commercial Manager."

This station for the year 1934 paid the society \$15,981.

Users Have Always Struggled to Secure Performing Rights Free and This State Statute is Part of the Program in this Direction.

The National Association of Broadcasters chooses to appear in the light of an apparent champion of the composer, and in its bulletin (Feb. 18, 1936, p. 22) says the following:

"In pursuing this or any other programs, it cannot be made too clear that it is in the best interest not only of the broadcasting industry but of the public that every encouragement be given to writers and composers of music, both for the sake of the advancement of their art as such and in order that a constant supply of music of the best quality be made available to listeners. To accomplish this, as I know is realized by the entire industry, no scheme will succeed that attempts to do anything else than compensate them, and compensate them generously, for their work and their talent."

[fol. 122] Put to the acid test a few illustrations will suffice to show that the professed generosity has been wholly in favor of the broadcaster.

Every step taken up to the time of the issuance of this bulletin was to secure from songwriters the free use of their compositions for public performance for profit, either by voluntary licenses or by compulsion under acts of Congress or by judicial determination.

The National Association of Broadcasters, in a circular letter dated December 31, 1923, and signed by Raymond Walker, manager of the Bureau of Music Release, solicited compositions for broadcasting purposes free of charge over the stations of the association upon the condition that—

“When a number has been accepted by us for release, the copyright owner furnishes us with 100 dance orchestrations and the same amount of professional or song copies which we distribute to our members who in turn place them in the hands of artists who broadcast at their stations. The copyright owner also signs contracts allowing us a fair percentage of the mechanical royalties.”

This practice with respect to nonmembers of any performing rights organization still prevails.

Station WLS of Chicago, Ill., a commercially operated station having 50,000 watts, affiliated with the NBC Blue network, as late as March 1935 solicited licenses from composers who were requested to sign a regular blank form of release prepared by the station as follows:

“We hereby grant you a license to perform for radio broadcasting and to radio broadcast (including television) such performances over any stations you may desire, by wire lines or by means of any mechanical device, any or all [fol. 123] compositions published by us and/or bearing our name as copyright proprietor and/or any or all compositions for which we now control the performing rights or for which we may acquire performing rights during the period of this agreement.

“Neither you nor any of the radio stations broadcasting such compositions pursuant hereto shall be required to pay license fees for such performances and broadcasts. You shall have unlimited discretion as to the time, place, and frequency of performance and broadcast.”

June 28, 1935, station WNEW, Newark, N. J., 2,500 watt station, commercially operated in New York City, advertising itself as the large regional station in the metropoli-

tan trading area, solicited permission under blank form of license, which reads:

"It is hereby agreed that I grant you a license to perform for radio broadcasting over station WNEW and to radio broadcast or perform over the above-mentioned and other stations owned or controlled by or affiliated with you, all music of my composition (except such as hereinafter described), granting you the rights under the period of this agreement.

"Neither you nor any associated stations broadcasting such music shall be required to pay a license fee for such performance or broadcast.

"This agreement shall include all music of my composition except such as may be reserved by me by means of formal written notice delivered in your hands."

On September 4, 1935, WOR, Bamberger Broadcasting Service, Inc., Newark, N. J., a commercially operated station affiliated with Mutual Broadcasting System and stations WGN Chicago, WLW Cincinnati, and CKLW Windsor-Detroit, solicited permission to broadcast numbers on its blank form releases, which read as follows:

"We hereby grant you a license to perform for radio broadcasting and to radio broadcast (including television) [fol. 124] such performances over any stations you may desire, by wire lines or by means of any mechanical device, any or all compositions published by us and/or bearing our name as copyright proprietor and/or any or all compositions for which we now control the performing rights or for which we may acquire performing rights during the period of this agreement.

"Neither you nor any of the radio stations broadcasting such compositions pursuant hereto shall be required to pay license fees for such performances and broadcasts. You shall have unlimited discretion as to the time, place, and frequency of performance and broadcast.

"The duration of this license to perform shall be for a period of 1 year from the date hereof, and thereafter it shall continue in effect until 30 days after the giving of written notice to you by mail directed to you at your Newark address.

"You are also authorized to make such arrangements and transcriptions of said works as you may find necessary or



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desirable for broadcast use, and to have and permanently retain as your property all materials thereof which you have deemed it expedient to make or duplicate for the purpose of facilitating such performance."

October 14, 1935, the National Broadcasting Co. requested Mrs. Justin Elie, the widow of a composer, to grant it a license to perform her husband's work upon these conditions:

"I do further license you to perform and to license others to perform said compositions and to radio broadcast (including television) said performance over any stations you may desire wherever located without the payment of any performing right or broadcasting fees whatever."

Upon the trial of the United States v. The Society, (S. D. N. Y., 1935, case unfinished) one Thomas Belviso (a Government witness), the program director of the National Broadcasting Co., testified as follows (p. 376-378):

[fol. 125] "And doesn't that mean licenses from individual publishers or composers?"

"A. Yes, we have some of those, too.

"Q. And you do from time to time take licenses from persons, firms, and corporations who are not members of the society?"

"A. True.

"Q. And as to those, you call them by the name of private licenses?"

"A. That is right.

"Q. Now, does the National Broadcasting Co. pay for those private licenses?"

"A. No, we do not.

"Q. These you get for nothing?"

"A. That is right."

He further testified that in respect of certain Argentine numbers which he required for his program, he just took them and did not pay for the right to broadcast them (p. 378):

William Benning (A Government witness), program director of WTMJ, of Milwaukee, Wis., 5,000-watt station, commercially operated, testified that he required nonmembers of any performing rights society to sign substantially

similar releases as those hereinabove described; that there were quite a few of such releases and under them the composers received not a penny for the broadcasting of their works (pp. 681, 682, 683).

The society stands between the exploiter and the victim. If the society can be destroyed by litigation or legislation the organized users will easily secure licenses upon starvation terms.

In *Performing Rights Society of Great Britain* in its case against Thompson (34 T. L. R. 351) the Court says:

[fol. 126] "Now, the position of the plaintiff company appears to be this: It was formed in the year 1914 and the circumstances under which it was formed apparently were these: It was found that it was difficult for authors to recover the proper remuneration for their performing right in respect of infringements that might take place all over the country. Such author would have to, first of all, ascertain whether his work was performed or not, and then would have to enter into the necessary correspondence with regard to it, and if the correspondence was insufficient to protect him, to undertake the necessary litigation, and, on the other hand, if persons desired to be honest and pay for the property that they were using, it was not very easy for them to ascertain in all cases where the copyright was or who they had to ask for permission to perform.

"These difficulties, as I understand, are difficulties that have existed for a number of years not only in this country but in other countries, and in other countries societies have been formed in which music composers and music publishers have associated together in an association which protects for the authors and composers who form the members of the association their respective rights of copyright, and, following upon the lines of the large and successful French society with similar objects, in 1914, this society was formed and it now comprises amongst its members a number of the leading publishers of popular music and leading composers of popular music \* \* \* There is no doubt it comprises a large number of persons who in every respect represent the musical world so far as it can be judged by the composition and publishing of popular music. \* \* \* One has very little sympathy when a thief complains of the organization of the police force and one would not listen with

sympathy to a complaint by a burglar that the constable who arrested him was receiving larger remuneration than he ought to have or that he was going to receive a bonus for his success in detecting the crime. I am not suggesting, of course, in this case, that the defendant was in the position of a thief or burglar, but at the same time one has to remember that there are a great many persons honorable in every transaction of life who do have very loose notions as to the honesty of dealing with other persons' property in such matters as copyright \* \* \* I certainly think that [fol. 127] it is satisfactory to find that this society, which, after all, in the present case is merely engaged in securing the fruits of their labors to the musical composers, has a legal object and cannot be defeated in what one cannot help feeling is a position of public interest."

The Select Committee of the House of Commons, Great Britain, which investigated the performance of copyrighted musical works in 1930 reported:

"Nor do they wish to place any obstacles in the way of composers forming an association for the purposes of protecting and enforcing their performing rights. Such an association is undoubtedly a convenience and almost a necessity, both to the composers, music publishers, and the user of music who would be considerably embarrassed if he had to deal separately with each piece of music performed. In fact it may be said to be the only practicable way in which the composer can collect his fees for performing rights in any adequate manner. If such an association is to function effectively, it must obtain as nearly a super-monopoly of the monopolies conferred upon composers by the copyright acts."

In the report of Judge Parker, a commissioner appointed by the Canadian Inquiries Act, March 22, 1935, he makes the following statement (p. 7):

"\* \* \* Then came the radio and the sound film, and the employment of many thousands of people in the production of music for broadcasting and the showing of films.

"With such developments it became impossible for any individual author or composer to be able to ascertain the extent to which the composition which was the subject of his copyright was being produced in one or other of the many forms of musical production which had come into



existence. This made it necessary for authors and composers to have some kind of organization to protect their interest. Such an organization had been existent in France for many years, but the need for such organizations was emphasized by the new conditions which had arisen.

[fol. 128] "It is a central bureau established for the convenience of the copyright owners on the one hand, and the music users on the other hand, and it was conceded by all those appearing at the inquiry that such a bureau is necessary to protect the performing rights of authors, composers, and publishers, and is a convenience to the users of music in obtaining the performing rights."

Composers Now Look to the Royalties Derived from Licenses to Broadcasters, Exhibitors and Hotels as Their Principal Source of Income from Their Works

Judge Parker of the Canadian Commission found (p. 9):

"Copyright in a musical work is divided into three separate property rights. They are, first, the right of publication in printed form; second, the right of reproduction on mechanical contrivances; and third, the right of performance. The Copyright Act of Canada sets out specifically what it meant by performing right. In a nontechnical sense, and with particular reference to music it may be described as the exclusive right to perform a musical work in public.

"Until recent years, authors, composers, and publishers looked mainly to the first property right mentioned above in the form of sales of sheet music for their revenue. With the popularization of records, the second property right came into prominence, and although this provided a new source of revenue to the owner of the copyright, there was a decrease in the sales of sheet music, with a consequent loss of revenue from that source. It is to be observed that these first two rights which were looked to for revenue are not performing rights.

"In the last few years the development of radio has caused a decrease in the sale of sheet music and records. The broadcasting stations have undoubtedly familiarized the public with many pieces of music, but the total result has been a reduction in revenue for the authors, composers, and publishers from the sale of sheet music and records.

[fol. 129] The societies which control the copyright, including the performing right, have looked to the fees from licenses conferring the performing right upon music users to compensate them in part for the losses suffered from the decrease of sales of sheet music and records. This consideration has been one of the factors determining the tariff of fees for performing rights."

The piano, the phonograph, victrola, and player piano have been relegated to the "horse and buggy" era. The sales of sheet music, phonograph records, and piano rolls have been reduced by 80 per cent by radio competition.

#### The Widespread Use of Radio Has Seriously Diminished the Income of Authors and Composers from Other Sources

Simultaneously with the growth of radio and its use of music came a diminution of income to the authors and composers.

The income from sales of sheet music and books of music graphically illustrates the decline in income since the advent of radio. The United States Government reported the following income from those sources:

1927	\$17,146,715
1929	16,537,747
1931	12,203,657
1933	2,340,723

The income from mechanical royalties for six representative publishers in the field of popular music graphically illustrates the decline in income since the advent of radio. The publishers reported the following income from that source;

[fol. 130]

1924	\$638,380.56
1925	714,724.80
1926	936,224.72
1927	852,588.82
1928	723,689.72
1929	562,267.20
1930	284,139.81
1931	173,668.57
1932	79,337.53
1933	51,770.88

A similar loss of mechanical royalties was suffered in the field of standard music where the income of six representative publishers from 1924-34 inclusive was as follows:

1924	\$27,701.01
1925	19,012.77
1926	13,767.90
1927	11,771.85
1928	15,300.12
1929	13,560.84
1930	7,724.12
1931	5,390.67
1932	79,337.53
1933	3,345.88

Statistics reveal the decline of the legitimate show. The Motion Picture Herald compiles statistics which show that whereas in 1920 there were 68 musical productions, in 1934 there were only 24. In 1920 there were 26 successful musical "hit shows," and in 1934 about 8. A compilation of the total number of musical productions and musical hits from the Motion Picture Herald of November 17, 1934, is as follows:

Year	Total musical productions	Musical-hit shows
1920-21	68	26
1921-22	54	20
1922-23	54	15
1923-24	50	24
1924-25	59	30
1925-26	62	27
1926-27	70	29
1927-28	69	27
1928-29	63	25
1929-30	62	21
1930-31	45	13
1931-32	46	9
1932-33	32	9
1933-34	24	8

[131] The public looks to the radio for its amusement, recreation, and entertainment. The public pays for that

entertainment by way of added charge to the merchandise purchased by it and advertised through radio media.

### What Was Spent for Radio in 1936

(Compiled by Radio Today, January 1937)

Sale of time by broadcasters .....	\$114,000,000
Talent costs .....	36,000,000
Electricity, batteries, etc., to operate 33,000,000 receivers .....	150,000,000
8,000,000 radio sets sold .....	440,000,000
46,000,000 replacement tubes .....	31,000,000
Radio parts, supplies, etc. ....	45,000,000
Servicing radio sets .....	75,000,000
U. S. Public paid for radios in 1936 .....	\$891,000,000

This \$891,000,000 could never have been realized but for the raw material furnished to the radio industry by the world's composers. Eighty per cent of broadcast periods are devoted to music. The broadcasting industry paid \$3,200,000 for the year 1936 to the American Society and its affiliates, representing 44,000 composers.

On January 1, 1937, there were 33,000,000 radio sets in use in the United States. The radio audience is 80,000,000. The radio broadcasters in the State of Florida, as well as in other States of the Union, are making a profit of 350% on their investment. This is borne out by a statement made by George H. Payne, one of the Federal Communications Commissioners, as reported in "The New York Times" of April 25, 1937 and reprinted in "Broadcasting" of May 1, 1937, the spokesman for the radio broadcasters of the country. The article is as follows:

[fol. 132] "Payne Reported Seeing '350%' Profit for  
Radio

"In another speech on the subject of broadcasting, FCC Telegraph Commissioner George H. Payne is reported in the *New York Times* of April 25 as stating that the industry will probably show a profit of '350 per cent' this year. He addressed the conference of District 2 of the American College Publicity Association at Adelphi College, Garden City, L. I. Mr. Payne again was quoted as asserting that there was \$40,000,000 invested in the broadcasting business and that its gross revenue last year was \$107,000,000.



"Although expressing the belief that there was a great opportunity for college men and women in broadcasting, Mr. Payne is quoted in the *Times* as saying:

"Unless broadcasting companies begin to pay attention to public criticism, they face a rough road ahead. In every other country of the world they do not permit advertising and they send cultural education over the air. In this country we allow the broadest liberty. Some broadcasts are pumping into private homes material about nostrums, foods that have not been demonstrated as beneficial and certain medicines that the people should never be urged to buy."

### Salaries Paid to Radio Artists

The radio broadcasters have always objected to paying anything to the 44,000 song writers throughout the world whose music makes the operation of their stations commercially profitable. But there seems to be no limit to the salaries paid to those who merely perform these songs. The following 15 radio artists received more per week from radio than all the song writers combined (Heinl Radio Letter, Jan. 4, 1935):

[fol. 133]	Preradio	Postradio
Joe Penner	\$850	\$7,500
Ben Bernie, orchestra	2,000	7,500
Fred Waring, orchestra	3,500	10,000
Eddie Cantor	7,500	12,000
Jack Benny	2,000	4,500
Phil Baker	2,000	5,000
Burns and Allen	850	5,000
Kate Smith	850	6,500
Morton Downey	1,500	4,500
Block and Sully	750	2,500
Jane Froman	400	2,000
James Melton	300	1,500
Jack Pearl	2,000	8,500
Ed Wynn	5,000	10,000
Dave Rubino	400	2,500

In 1936, \$36,000,000 was spent for talent by sponsors presenting commercial programs over broadcasting stations in the United States. Artists' bureaus of radio stations, including those located in the State of Florida, receive sub-

stantial fees for booking these features. An idea as to how the income from this source has been increasing is that in 1927 \$1,000,000 was spent for radio talent. In 1928 and 1929 \$5,000,000 was spent. In the short space of 8 years the expenditures in this direction have increased 36 times.

Advertising agencies for presenting radio programs on behalf of commercial sponsors for 1934 received \$9,000,000 as commissions. The Agency's participation is merely booking the sponsor on the radio stations and then directing or participating in the staging of the show for the sponsor. In every instance the raw material for each program which the agency helps to bring together is the music. For this the 45,000 authors and composers of the Society whose music was used, received \$2,058,392.93.

Says Justice Owen in the report of the Australian Royal Commission (1933):

[fol 134] "That broadcasting generally has affected the sales of sheet music and records is undoubted. It supplies attractive entertainment and variety easily and cheaply within and without the home, with the result that the public look to broadcasting for pleasure and recreation rather than to sheet music and records."

The talking motion picture, the radio musical-entertainment broadcast, the hotel and night club floor shows have been the legitimate theatres' most aggressive competitor. So much so that legitimate musical attractions presented in each year on the New York stage have been reduced by 70 per cent, owing to this keen competition.

Says the Motion Picture Herald (Nov. 17, 1934):

"The so-called 'legitimate' production long since gave up the ghost as a serious competitor to the motion picture, and, regardless of its progress henceforth, it is generally considered unlikely that the stage ever will be resurrected in a form that will cause the motion-picture exhibitor any concern."

Subsequent events will bear out this prophecy.

Constant Radio Repetition Shortens the Life of a Song

The constant broadcasting of a particular composition shortens its popularity and prevents the composer from securing such returns from other sources as were formerly possible. An outstanding hit is often played from 10 to 12

times a night. The life of a song is shortened by too frequent repetitions. Two months is fairly close to the limit for the life of a song in the popular class today.

Radio broadcasters themselves realize the destructive effect of too constant repetition. Mr. Roy F. Durstine, representing one of the largest advertising agencies in the United States, writing in *Broadcasting*, January 15, 1935, listed as a suggestion to commercial broadcasters:

[fol. 135] "Keep popular songs from committing suicide by restricting them from being played every night in the week on every station, if not on every program."

For the year 1934 over 85 songs were played over the air 10,000 times, or more, each, over stations affiliated with the National Broadcasting Co. and the Columbia Broadcasting System.

Sound motion pictures caused a reduction in the employment of musicians. According to the American Federation of Musicians, there were employed 16,000 less musicians in motion picture theatre orchestras in 1932 than in 1925.

In practically every home the radio has become the common form of entertainment. The piano and the player piano, as well as the victrola, are no longer the principal instrumentalities by which the people in the homes are entertained. The record of the sale of pianos discloses as follows:

In 1923 the sale of pianos amounted to \$104,000,000; in 1925, \$93,670,000, and subsequently fell off, until in 1931 it was \$12,000,000; and the latest figures available, to wit, 1933, disclose that the sales amounted to \$7,000,000.

The sales of phonographs in 1925 amounted to \$22,600,000, and reached a peak in 1927 of \$46,000,000. In 1931, it was \$4,869,000. Today no figures are available, because of the combination of phonograph and radio in one set.

In some radio stations electrical transcriptions are used as a means of providing entertainment either in the form of "spot" broadcasting, sponsored programs, or sustaining programs.

[fol. 136] The owners of broadcasting stations derive income, benefits, and advantages from several sources, directly and indirectly. The direct sources of income are (a) moneys paid to the stations by advertisers for time on the air; (b) moneys received by stations from the operation of artists bureaus; (c) miscellaneous.

### Sales of Time on the Air

In 1933 the income of all radio broadcasting stations for the sale of time on the air was \$45,000,000; in 1934 it was \$73,807,000, in 1935, \$88,000,000; in 1936 it was \$114,000,000.

The 10 stations located in the State of Florida received a net revenue from the sale of time on the air to advertisers, alone, in 1935, in the sum of \$580,000.

During that year, they paid to the Society, under license agreements for the right to perform publicly for profit the copyrighted musical compositions of the Society and its members and the 44,000 members of the affiliated societies, the sum of \$21,044.93.

59.5%, or a total of 250,600 families in the State of Florida, out of the entire number of families in that State, totaling 421,000, own radio receiving sets. These figures appear in the May 1, 1937 issue of the magazine "Broadcasting", and were compiled by the joint committee on radio research of a number of radio broadcasting associations, including the NAB.

[fol. 137]

### Artists Bureau

In addition to the receipts from sponsored programs many broadcasting stations operate artists bureaus from which they derive substantial income.

These artists bureaus arrange for and provide talent for radio programs. In many instances the artists used in commercial programs are individuals who have been presented on sustaining programs.

The artists bureau makes a commission ranging from 10 to 25 per cent for all engagements filled by its artists, which commission is paid by the artists. It likewise makes agreements with these artists under which their services are made available not only for radio programs but also for concerts, private parties, motion pictures, the legitimate stage, social functions, tours of vaudeville theatres and other types of amusement places, and in its agreements provide for commissions on each contract made on behalf of said artists. The Columbia Broadcasting System concert bureau handles 124 artists, and National Broadcasting Company 86. Among their artists are Fritz Kreisler, Kirsten Flagstad, Nelson Eddy, Nathan Milstein.

### Miscellaneous

Another source of income is the charge made by some radio stations to those who visit the studios and/or its tech-



nical rooms. The outstanding example of such a charge is that made by N. B. C., which charges 40 cents per person for a guided tour through its New York City broadcasting station and studios. In 1935 approximately 20,000 persons were taken on such tours. (See Zits, Oct. 31, 1936.)

[fol. 138] Another source of income has been the N. B. C. Thesaurus Library established by the National Broadcasting Co. This makes available to the smaller stations and advertisers through a lease a composite recorded program of diversified music at a cost much less than live talent.

Radio stations (including those located within the State of Florida), in connection with the presentation of commercially sponsored programs, make charges for the use of musical instruments, rehearsal halls, and other accessories which are a part of the equipment of the broadcasting station. For example, in one year in Chicago the National Broadcasting Co. charged a flat rate of \$100 per week from each account using the organ facilities of the station. Each client paid the round sum of \$5,000 per year for the right to use this instrument. Some eight accounts used the organ for eight shows, and at the rate of \$100 weekly paid \$40,000 a year for rental of this particular type of musical instrument. (See Variety, Feb. 5, 1936.)

### Indirect Sources

The benefits and income derived from the operation of a radio broadcasting station are not limited to the direct means heretofore described. Many of the broadcasting stations are owned by commercial concerns such as department stores, life-insurance companies, electrical-equipment concerns, radio manufacturers, automobile manufacturers, newspaper companies, etc., which use the broadcasting station as a means of enhancing their good will.

Those stations which deal in electrical and radio equipment receive the benefits of broadcasting in more tangible [fol. 139] form, since it promotes the purchase of equipment produced by them. In fact, the operation of broadcasting stations is of distinct benefit to the entire radio manufacturing industry in that people are constantly purchasing sets, and those who have sets are constantly replacing them in order to obtain the latest improvements in radio receiving sets.

Commercial concerns other than the electrical-equipment and radio-equipment concerns have operated radio stations in conjunction with their businesses. For example, Station

WOR, in New Jersey, is owned by L. Bamberger & Co., Inc., a department store, and at stated intervals in the course of their broadcasts stress has been laid upon an announcement "L. Bamberger & Co., one of America's great stores, Newark, N. J."

Similar uses of radio broadcasting stations, for the purpose of advertising independent business enterprises owning the stations, are employed in the State of Nebraska.

The benefit derived from this form of advertising, for which the department store pays nothing, is a separate advantage which cannot be estimated in financial returns.

A list of some of the stations owned and operated by commercial concerns is:

KSUN, Copper Electric Co., Bisbee, Arizona.

KOY, Nielsen Radio & Sporting Goods Co., Phoenix, Arizona.

KTAR, Arizona Republic & Electric Equipment Co., Phoenix, Ariz.

KFPW, Southwestern Hotel Co., Fort Smith, Ark.

KARK, Arkansas Radio Equipment Co., Little Rock, Ark.

KFWB, Warner Bros. Broadcasting Co., Los Angeles, Calif.

WTIC, Travelers Insurance Co., Hartford, Conn.

KFBI, Farmers & Bankers Life Insurance Co., Abilene, Kan.

WBZ, Westinghouse Electric & Manufacturing Co., Boston.

WNAC, Shepard Department Store, Boston, Mass.

KSTP, National Battery Broadcasting Co., St. Paul-Minneapolis, Minn.

WJDX, Lamar Life Insurance Co., Jackson, Miss.

KFEQ, Scroggin & Co., Bank, St. Joseph, Mo.

[fol. 140] KOIL, Monamotor Oil Co., Omaha, Neb.

WHN, Marcus Loew Booking Agency, New York City, N. Y.

WHAM, Stromberg-Carlson Telephone Manufacturing Co., Rochester, N. Y.

WGY, General Electric Co., Schenectady, N. Y.

WTMJ, Milwaukee Journal Co., Milwaukee, Wis.

WLW, Crosley Radio Service, Cincinnati, Ohio.

WJAR, Outlet Co. Department Store, Providence, R. I.

WTAQ, Gillette Rubber Co., Green Bay, Wis.

KGHL, Northwestern Auto Supply Co., Billings, Montana.

Station WLW, operated by the Crosley Radio Service, manufactures radio sets and other mechanical equipment. Their products are constantly advertised over radio station WLW in connection with its operation. As a result, a record number of sets were sold last year.

The Radio Corporation of America is a manufacturer of radios, equipment, etc. Its chief subsidiary, the National Broadcasting Co., operates and manages more than 12 radio stations which advertise the products of the Radio Corporation of America. In 1935 the Radio Corporation of America grossed \$87,563,646, an increase of 13.3 per cent over 1934, which was \$77,300,112.

There were one hundred and ninety-two newspaper-owned radio stations on January 1, 1937. These stations have been found very useful in increasing the circulation of a newspaper.

The Milwaukee Journal Co., operators of radio station WTMJ, has said that a radio station is a valuable adjunct in stimulating the activities of a newspaper. Variety, September 2, 1935, reports the following:

#### “Radio Helps Sell Paper, Says WTMJ

“A question contest just completed by WTMJ, owned by the Milwaukee Journal has disclosed that in the case of this station, at least, radio is helping sell the Journal. Fifth in preferences of the outlet's programs was its news broadcasts, with replies coming from listeners indicating this factor and also that the news spots served to fill in when [fol. 141] it was impossible to get a paper. Several answers were directly to the point that the broadcasts increased the desire to see the Journal.

“Contest was put on to build afternoon audiences and to get information on the afternoon listeners for sales-promotion purposes. Various cash prizes were awarded to listeners answering questions and telling of their favorite WTMJ program.”

George H. Payne, Federal Communications Commissioner, October 31, 1935, said:

“Advertisers are interested in selling goods and want entertainment only as it creates an audience to which they can address their patter.”

John W. Elwood, vice president in charge of program development of the National Broadcasting Co., in an address filed with the Federal Radio Commission, August 15, 1930, said:

"Radio is a show business, \* \* \* But radio was and still is accepted essentially as a show—something to which one may turn as a diversion from the daily cares of business or the home. We look to it for music, for drama, for descriptions of important events, for daily vaudeville. \* \* \* It (radio) is built upon bricks and mortar laid by musicians, literature, playwrights, and authors since the beginning of civilization. \* \* \* What the public demands from radio is entertainment. \* \* \* The person or institution failing to recognize that radio is essentially an entertainment medium is firing blank cartridges when it broadcasts. \* \* \* Broadcasting, from a business angle, is the essential promotion agency of a great industry; namely, that of manufacture and sale of radio-receiving sets, speakers, and accessories.

. . . . .

"Let us not lose sight of the fact that there are nearly 600 radio stations in the country and that a relatively small percentage of the total time on the air is devoted to education per se. The licenses (to operate radio stations) are granted with the requirement that the authorized stations operate to the public interest, convenience, and necessity. [fol. 142] There are undoubtedly many programs broadcast which would be difficult to recognize as coming within any of these classifications."

#### Issuing Blanket Licenses Is the Only Workable System for the Benefit of Both Users and Creators of Musical Compositions

Justice Parker, in his report (Mar. 22, 1935) said:

"\* \* \* The logical basis, of course, would have been to make individual charge for each performance of each individual work, but this basis had been found in European countries not to be practicable. Owing to the fact that the joint repertoire of the several societies was so large, and the use of it by the music users so frequent, it would have been necessary for the societies to prepare thousands of



different prices for the many classes of works for their use in many different types of establishments, to numberless sizes of audiences, but in particular it would have been necessary for the music user and the societies to prepare and check expensive and troublesome accounts of the works performed and of the length of times of performances, and of the numbers of the audiences, in order to reckon the amount due, greatly increasing the cost of the societies' operations and greatly increasing the necessary fees. In other countries all this was seen to be unnecessary as soon as the scope of the societies' repertoire was recognized; as soon as the music user came to realize that of the works he desired to perform in his performances a large part, and in some cases practically all, were works controlled by the societies. There has, therefore, come into use in other countries a license permitting performances at will, to any extent, from the joint repertoire of the societies, that is to say, a right of user license."

Notwithstanding the impossibility of issuing licenses for the public performance for profit of copyrighted musical compositions on a per-piece basis, as pointed out by Judge Parker, the States of Montana, Washington and Tennessee enacted statutes which made such a system compulsory. Those States, although purporting to regulate monopolies, [fol. 143] provided that the alleged monopolies would be lawful if they issued licenses on such a per-piece basis.

On its face, this showed that there was no bona fide desire for a per-piece system on the part of the users, but that the real object of those provisions in the Montana, Washington and Tennessee Statutes was to make it impossible for a single individual copyright owner to license his compositions in those States.

In addition to the observations of Judge Parker attempted compliance with the Montana, Washington and Tennessee Statutes would require the maintenance of a detective force to supervise the over 30,000 establishments in the United States which use music, to make certain that the users compensate the copyright owners for all the musical compositions publicly performed by such users for their own profit within those States.

The cost of maintaining a corps of investigators, the cost of maintaining a staff of listeners-in to cover some 600 radio broadcasting stations would entail an annual expenditure

in excess of \$2,000,000, an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate.

The fact of the matter is that no other group of users has ever requested or expressed the desire to bargain separately for any single number, or group of numbers, or a catalogue of numbers. The first suggestion came in 1932 from some members of the radio industry. The industry itself has never been unanimous in support of any such suggestion.

[fol. 144] Night clubs and dance halls, cabarets, restaurants, hotels, and motion pictures keep no logs of music use. Under the Federal Communications Act all that the radio stations are required to report to the Commission is the general nature of the programs, that is, whether they are dramas, music, speeches, etc. The log kept in that manner is conceded to be worthless as a basis for any system requiring individual creators of music or their publishers, to deal separately with users of music for licensing the public performance for profit of individual copyrighted musical compositions. Very few stations keep their radio logs, and whatever logs are kept are inaccurate.

Even in the case of larger stations, which presumably have the staff to keep a record of the compositions played, experience has shown that they fail to record and report properly. Thus, in 1935 the Columbia Broadcasting Station, the second largest broadcasting company in the United States, failed to include in its log a composition which was played by the Philadelphia Symphony Orchestra. The composition did not appear on any of the logs furnished, and it was only after several inquiries by the copyright owner, who was not a member of the Society, that it was ascertained that the composition was broadcast as a request number by way of an encore, and therefore did not appear on the log.

Comparisons made between the logs of the stations and the numbers as taken down by various persons disclose many omissions and errors.

[fol. 145] Smaller stations are opposed to such system of individual licensing because of the tremendous expense and hardship which would be imposed upon them.

Thus, an owner of one of the smaller radio stations, station KLUF, located in Galveston, Tex., wrote the Society as follows:

" \* \* \* I wish to add a word or two in regards to any future change of charges, such as I have read in Broadcasting—there seems to be a move on to change the manner in which they copy 'rite' fee shall be—favorable comment about charging so much per piece broadcast—this would be a distinct hardship upon us, because our force is very limited, and this would necessitate more clerical work which we are not prepared to undertake, and while it is sometimes hard to pay your price per month, still it is much easier than to do any other way—at least I think so."

Broadcasting Stations in Florida do not keep a record of all the musical compositions broadcast by them.

Owners of larger stations have likewise opposed the per piece system. Thus the owner of station WCAU, part of the Columbia Broadcasting Chain, in the magazine Broadcasting, stated in no uncertain terms his opposition to any system of individual licenses as being practically impossible of operation.

Even in the matter of reporting the sums of money, which is by far a simpler operation than the recording of the musical compositions, many stations have failed to accurately report the moneys received by them, so that the share to be given to the Society could be ascertained. A fair percentage of the broadcasters have failed to report on the actual income due to the Society and have been arbitrary in their attitude.

[fol. 146] There is no way of placing a value upon the performing right, of a single number or a group of numbers, or even of the numbers of an entire catalogue of a particular music publisher. Each number has an entirely different value. Many factors must be taken into consideration, such as the celebrity of the composer, the popularity of the song, the frequency of repetition, the nature of the use, whether for radio, dance hall, motion picture, cabaret, hotel and night club, the size of the orchestra, the number of people witnessing or listening to the performance, the direct or indirect profit made by the user from the performance, the particular numbers played to make a complete program, and a host of other factors. The State Statute makes no provision for such factors and differences.

These Statutes, while ostensibly drawn to provide for a compulsory system of individual licensing, are actually designed and must inevitably lead to the destruction of complainants' rights, for the reason that no such system is possible.

No records can be kept which will insure payment under such system, for, in order to keep such records a tremendous burden would be imposed upon the users of musical compositions in those States.

Many of these users (including users in those States as well as in Florida) pay very nominal license fees to the Society, some as low as \$20.00 a year.

It will cost a great deal more than that for these users to install a system of bookkeeping and accounting that would have to be installed under such system.

The amount now paid by users in those States would not [fol. 147] be sufficient to reimburse complainants and others similarly situated for the necessary expenditures that they would have to make in order to investigate and check up on individual uses of their compositions as well as the necessity for the employment of accountants to examine reports from users and ascertain whether payments have been made honestly or otherwise.

The users in Nebraska and Florida have attempted to secure the free use of these copyrighted compositions in the public performance for profit by a different method, and one which would not involve them in the expense and trouble of keeping complicated accounts and making endless negotiations for individual licenses with owners of copyrights.

The scheme in Nebraska and Florida was very simple. Upon the purchase of a sheet of music, the purchaser, under the Statutes enacted in those States, has been given the right to make public performances for profit, as well as records and transcriptions and other uses of the copyrighted composition, without making any payment whatever other than the initial purchase price for the sheet of music or the record to the owner of the copyright.

The Nebraska Statute was passed before the Florida Statute (May 17, 1937), and was openly sponsored by the Amusement Protective Association of Nebraska. That organization secured the passage of the Statute by representing to the users in that State that if the Statute were



passed, they would no longer be required to pay for the public performance for profit of any copyrighted musical composition. Their members were circularized by the following letter:

[fol. 148] "Amusement Protective Association of Nebraska  
301 South 31st Street—Omaha, Nebraska

Matt Kobalter Director, Lincoln. Joseph W. Smith, Director, Hastings. Bert Glover, Director, Grand Island. Joseph Malec, Pres., Omaha. H. H. King, Vice-Pres., Norfolk. H. A. Marble, Sec'y & Treas., Omaha. William Barclay, Dir., Plattsmouth. George Sharpnack, Dir., Lincoln. Roy F. Gordon, Dir., Bennington.

March 13th, 1937.

DEAR SIR:

At a meeting of more than twenty-five representative ballroom operators held at the Fontenelle Hotel, Wednesday, March 11th, this organization was formed for the protection of all operators in regard to state legislation or any forces which might take unfair advantage of us. The men listed above were chosen as officers of the organization.

Our First Big Problem is the Promotion of the Bill 478 Which Will Protect Us Against the Payment of the So-called License to Play Copyrighted Music at Public Performances for Profit. We have been forced to pay the American Society of Composers, Authors and Publishers long enough and we believe that if we all do our part, we will be able to keep this graft out of the state of Nebraska.

In order to aid in passing the Legislation Roll No. 478 which is of vital interest to us all, we are making the following suggestions:

1. Get in touch with the legislator from your district That You Know and explain to him how the monopoly created by the American Society of Composers, Authors and Publishers has unfairly collected from You and other operators year after year. Explain to him that you are vitally concerned with this legislation. Do not write or talk to any of the legislators that you do not know as too many letters or calls from strangers will only agitate them.

2. Attend the next meeting of the Amusement Protective Association of Nebraska to be held at Lincoln, Nebraska

at 10 a. m. Wednesday, March 17th at the Lincoln Hotel. The bill will be completely discussed at the meeting after which the operators will retire in a body to the committee meeting where the actual legislation will come up. It is Vitally Important That You or a Representative Be Present as every effort we can give will be necessary to show [fol. 149] this committee that every dance hall operator is interested in this protective measure.

3. So that you might be familiar with the proposed legislation, read over the enclosed sheet before you contact your legislator and before you attend the meeting at Lincoln.

Thanking you in behalf of the newly formed organization and trusting that we may count on seeing you at Lincoln on Wednesday to help us put this big job over, we are,

Sincerely yours, Amusement Protective Ass'n of Nebr., (Sgd.) by H. A. Marble, Sec'y."

In an action brought in the Federal Court of Nebraska, to enjoin the State officials of that State from enforcing the Statute, the Special Assistant to the Attorney General of Nebraska, William J. Hotz, Esq. (who was then, and had theretofore been, counsel for the above group of users) submitted in opposition to the motion for temporary injunction, a countershowing containing many affidavits of users of music in that State, seeking to justify the Statute. The following are a few quotations from the affidavits:

" 'Why should I pay an orchestra and then be fined for what the orchestra plays? It's like going to hell for somebody else's sins.' " (Aff. of E. J. Branigan, p. 22.)

"Affiant further states that the amount of money paid by a hotel such as the Fontenelle for music to orchestras, bands and singers in a year amounts to many thousands of dollars, but the American Society of Composers, Authors and Publishers likewise claims that even after the musicians have bought their music, and even though orchestrated by the publisher or the composer for no other purpose than public performance, and purchased for no other use, still the society demands and collects additional fees and so-called royalties, and with no way except the enforcement of the [fol. 150] Nebraska Act to curb further action of the combination as such." (Aff. of I. A. Medlar, p. 104.)

"Affiant states that in no way did he wish to or attempt to violate the copyright law but that if the orchestra in buy-

ing their music did not pay the royalty then his company certainly would not." (Aff. of F. D. Brodfuehrer, pp. 25-26.)

"Affiant says that he considers the charges for the music and band sufficient enough without having to pay the exactions demanded by A. S. C. A. P." (Aff. of A. J. Diedrich, p. 28.)

"Affiant further states that he placed on January 1, 1937, two notices on either side of the shell from which the orchestra played and which were in full view of the members of the orchestra which read:

Notice

Orchestras playing from this shell:

Do Not Play Copyrighted Music

1733 Nite Club

(Signed) Ben Griffin."

(Aff. of B. Griffin, p. 34.)

"Affiant further states that he is the *president* of the Amusement Protective Association of Nebraska, which is made up of a large number of the owners of similar pavilions and amusement park owners throughout the State of Nebraska, with a membership of about 390; that the association *took an active part* in having Legislative Bill No. 478 enacted into law, and took an active part in presenting the matter before the Legislature of the State of Nebraska and making demand for the passage of the bill as an effective, common sense protective measure for our people." (Aff. of Joseph Malec, p. 50.)

Attention is called to a scheme employed by one of the users to evade the payment of royalties to any copyrighted owner, and that is the notice to the orchestras not to play copyrighted music at the "1733" Nite Club.

The utter insincerity of the notice is manifest when it is considered that this was a place at which people dance, and that it would be impossible to give a pleasing, entertaining dance program of music without using modern copyrighted music. All music that is currently popular is copyrighted, whether by members of the Society or others.

[fol. 151] The motion for temporary injunction in the Nebraska suit came on for hearing before a Statutory Court

consisting of Archibald K. Gardner, U. S. Circuit Judge, Thomas C. Munger, U. S. District Judge, and James A. Donohue, U. S. District Judge. After due deliberation, that court on or about November 13, 1937, granted the motion for injunction and handed down its opinion and made an order for temporary injunction. Copies of the opinion and order are annexed to this affidavit at the foot thereof, as Exhibits "J" and "K" respectively. A copy of said Nebraska Statute is annexed hereto as Exhibit "L".

I have been informed and believe that the Florida State Statute was drafted by Mr. H. T. Rogers, a Florida attorney, who has for many years represented Robert Kloeppel, the owner of the Hotel Mayflower, in Jacksonville, Duval County, Florida. Mr. Kloeppel, refusing to pay license fees for the public performance for profit of the musical compositions of members of the Society and others, the Society brought suit against him in the Southern District of Florida, Jacksonville Division (Buck v. Kloeppel, 827-Eq.-J.). The suit was brought for infringement of a musical composition entitled "The Old Spinning Wheel", composed by William J. Hill, one of the complainants herein. This song is very popular and has been played and sung in every nook and corner of the United States, including the 50,000 establishments for entertainment wherein music is regularly performed for profit in this country. It is an outstanding song and will probably survive the composer and add luster to his memory.

In that infringement suit, Mr. Kloeppel, in an answer signed by the aforementioned H. T. Rogers, interposed, as one of his defenses, the following: (Ans. Par. 8.)

"Answering Paragraph 9, Defendant denies that Billy [fol. 152] Hill, a citizen of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition, and denies that the said Billy Hill composed and set original music to the said words and lyrics, which constituted a musical composition entitled 'The Old Spinning Wheel'. On the contrary, this Defendant alleges that the said musical composition referred to in said Bill of Complaint as being the Plaintiff's, was produced and made up by the unlawful use and appropriation of numerous copyrighted compositions and publications which were not, and never have been the property of Plaintiff, and which were appropriated, used, copied, pirated and em-



ployed by Plaintiff in defiance of the rights of authors and proprietors of same, and in violation and infringement of the copyrights thereof. Defendant admits that the publisher plaintiff represented to the Librarian of Congress that such Plaintiff was the author and proprietor of such musical composition, and thereupon sought to obtain copyrights of the same, but Defendant denies that said Plaintiff's action in that respect was in accordance with the statutes of the United States enacted for the purpose of copyright, and alleges upon information and belief that publisher Plaintiff's acts were in fraud of the statutes of the United States and constitutes an unlawful attempt to obtain copyright by publisher Plaintiff for material and substantial parts of the musical compositions of other persons for whose protection copyrights had theretofore been granted under the laws of the United States."

By that defense Mr. Kloeppel attacked the validity of the copyright in that musical composition, and its originality, and in effect designated Hill as a pirate and an infringer of other musical compositions.

If there were no Society, and Hill had brought a suit for infringement in Florida, he would have to meet the issue tendered by the above defense. He could adequately protect his rights, as well as his good name, only by engaging a lawyer skilled in the art of copyright litigation, at great expense, and he would have to produce, at his own expense, witnesses to testify to the origin of the composition, and he would have to engage, at his own expense, the services of an expert to testify with respect to all of the compositions involved in this issue, and who would advise his attorney [fol. 153] with respect to the proof adduced by the other side, expert and otherwise.

Needless to say, that would be a burden which Hill could not undertake. He is a man of modest means. I have known him for years, and know that his chief source of livelihood is the modest royalties that he draws from his compositions and the royalties that he draws quarterly from the Society.

The Society does not disclose specific instances of help given to its members and other composers, but I cannot resist the temptation to set forth a short statement made by Mr. Hill before the Patents Committee of Congress on February 27, 1936. Inasmuch as this statement has become a matter of public record and is printed in the Report of the

Hearings on a number of Copyright Bills then up for consideration, it divulges no confidence to set it forth here. It reads as follows:

“Mr. Hill: Mr. Chairman, years ago I came to New York. Shortly after that, I was made a member of the American Society. I did not have 5 or 6 cents; I only had about 3, and my wife was very ill with a nurse in a hospital on Eleventh Avenue. She was going to have a baby. They would not bring her up to the operating room until I got there with the money I was supposed to bring.

“Nobody had ever heard of me; my songs had never been heard of; I came to New York friendless and nobody had ever heard of me. I worked as a bus boy; I worked at anything I could get. I went up to see Mr. Buck of A. S. C. A. P. and told him the trouble I was in and in 15 minutes I had a check for \$250, and I was on the way to the hospital.

“My little girl is 3 years old now. They were turning off the gas on the same day and I will tell you the truth, if it was not for Mr. Buck I would have used that gas for something else. I mean it. I cannot tell you just what I mean, but that is just what I would have done. And that is why the Sirovich bill is so much more important to me than the Duffy bill.

[fol. 154] “If you will please forgive me, that is all I have to say.”

I know Mr. Hill's statement to be the truth, because, as he says therein, he came to me, and on behalf of the Society I made it possible for him to survive those troubled times, and made it possible thereafter for him to compose a great many successful songs, including “The Old Spinning Wheel”.

Coming back to Mr. Kloeppel's answer: He also denied that he had played that musical composition on the day in question; and although he denied playing the composition, he set forth in another defense, that his orchestra leader had received a professional copy of the song, furnished by the publisher, which constituted a license to perform.

Even with the Society functioning to detect infringement and to bring suits thereon, the Kloeppel case illustrates the impediments that are constantly put in the Society's way by users who are determined to perform copyrighted compositions for profit without the payment of any royalties.”

The Society is put to great expense in keeping a vigilant eye on such infringers; and with all its resources it has had great difficulty, over the years, with many of its infringement suits. Users have been clever and ingenious in interposing all sorts of defenses to the limit of human ingenuity.

In another suit pending in Florida (Buck v. Adams, Jacksonville Division, In Equity #810-J), the defendant operated the Ocean Beach Hotel at Atlantic Beach, Duval County, Florida. Charged with having infringed upon "The Old Spinning Wheel", by public performance for [fol. 155] profit, by means of an orchestra playing it in the hotel pavilion, Adams interposed the following ingenious counterclaim: (Ans. Par. 25-o)

"o. That this defendant, W. H. Adams, is President of the Ocean Beach Hotel Company, a Corporation, and as such President is the Manager of the Atlantic Beach Hotel at Atlantic Beach in the County of Duval and State of Florida; that this defendant has never individually, nor as President of the Ocean Beach Hotel Company, a Corporation, or otherwise, performed or had performed at his instigation, any copyrighted musical works for profit, nor has this defendant ever wanted, desired, needed or required the performance of any copyrighted musical works for profit; \* \* \*."

The method by which that defendant attempts to evade responsibility is exposed by one Henry C. Berg, at present a member of the Bar at Jacksonville, Florida, who, in August, 1934 (the year of the infringement) was in Mr. Adams' employ. Mr. Berg answered the following questions propounded by the Society's attorney, William E. Arnaud: (The questions were contained in a letter dated August 20, 1935 and the answers in Mr. Berg's letter dated August 21, 1935)

"1. Who furnished the pavilion for dance purposes, and what rental, if any, was paid for it? A. The pavilion was furnished by the hotel or its management, and, so far as I know, no rental was ever paid for its use.

"2. Who was responsible to the musicians for their pay? A. I know nothing of the contract with the musicians. It was entered into, I believe, before I began to work for the hotel.

3. What part of the gate receipts did Mr. Adams receive?

A. I do not know; I usually collected the gate receipts and turned them over to the management of the hotel.

4. Was there a sign posted in the lobby of the Atlantic [fol. 156] Beach Hotel to the effect that guests of the hotel might obtain tickets at the hotel desk which would entitle them to free admission to the pavilion with privilege of dancing? A. Yes, I printed it myself, under instructions from Mrs. Adams.

5. Were guests of the said hotel admitted to the dances at the pavilion on August 25, 1934, and at other times during the summer of 1934, without having to pay an admission or other charge. A. As well as I remember, guests of the hotel were admitted to the dance on August 25, 1934 as well as on the other dates on which dances were held. No admission was charged them so far as I know.

6. Was the privilege of dancing in the pavilion offered to prospective guests as an inducement for them to patronize the hotel? A. I suppose so. No secret was made of the dancing, and I suppose that prospective guests knew of it? I do not recall ever having told prospective guests about the dancing while I was on duty at the main desk in the lobby of the hotel.

7. Was Mr. Adams in charge and control of the dances and did you have to carry out his orders relative thereto? A. Mr. Adams was always present at the dances, but I do not know who was actually in charge and control of the dances; I suppose that it was either he or Mrs. Adams. I had to carry out orders coming from both of them, and from W. H. Adams, Jr., also, who worked in the hotel and was in charge of the bathhouse adjoining the hotel.

8. What were your arrangements with Mr. Adams for the performance of music for dances? A. I had nothing to do with any arrangements for the performance of music for the dances. I merely collected the gate receipts, and endeavored to see that the hotel guests enjoyed themselves at the dances.

9. Were you requested by Mr. Adams to sign a contract for the conduct of these dances in order to hold your job with him or the hotel management? A. One evening, the exact date of which I am unable to recall, Mr. Adams brought me



a charter of 'The Atlantic Beach Dance Club' and told me to [fol. 157] sign it. I did so. I do not recall ever having signed any contract for the conduct of the dances.

10. Did your contract of employment with Mr. Adams or the hotel management require you to run these dances and to sell and collect for tickets or admission thereto? A. My contract of employment was merely a verbal one; part of my duties were to sell and collect tickets at the dances, and to do anything else in the way of running the dances which I was told to do.

11. State any other facts which show that you and Mr. McClellan were merely conducting the dances for Mr. Adams or the hotel management. A. I was employed as a desk clerk in the hotel, and my duties in connection with the dances were incidental thereto. I never received any extra compensation or profit whatsoever from the dances. Mr. McClellan had best answer your questions himself, although I might say that he was merely an employee like myself. His duties were chiefly in connection with the bathhouse.

12. Was the pavilion a part of the hotel premises and adjacent thereto? A. Yes.

13. Did Mr. Adams give you, or anyone else instructions not to play copyrighted music at these dances? A. Mr. Adams never gave me any such instructions; whether or not he gave them to any one else, I do not know."

Similar instances of the interposition of ingenious defenses could be multiplied ad infinitum.

Obviously, the individual composer or publisher, dependent upon his own financial resources, is in no position to protect his rights of public performance for profit against infringement, particularly when we consider there are 30,000 establishments throughout the country that are performing musical compositions by the hundreds every day and night, and that even obtaining evidence of infringement is a difficult and expensive process, let alone the cost of engaging a lawyer and experts competent to cope with the defenses interposed by infringers.

[fol. 158] The State Statute was introduced in the Senate by Hon. John R. Beecham, State Senator, who is also the chief executive of radio broadcasting station WJNO, at West Palm Beach, Florida.

The Statute was introduced for the private benefit of the Florida radio broadcasters and hotel owners, who have powerful local trade associations. The Florida Association of Broadcasters has a membership of the following stations: WFLA, WFOY, WIOD, WJAX, WJNO, WLAK, WMBR, WMFJ, WTAM, WRUF, WSUN, WTAL. Senator Beecham is one of the members of the executive committee of the Association.

The method pursued by the broadcasters in sponsoring legislation similar to the State Statute is typified by the activities of E. B. Craney, owner of Station KGIR of Butte, Montana. Mr. Craney sponsored the Montana Statute, which was passed in the Spring of 1937. (In that State, suit was commenced by the Society in the Federal Court of Montana, and a motion for temporary injunction heard before a statutory court, which said motion is still undetermined.) Mr. Craney also sponsored a similar bill in Congress, but it was not passed.

In his campaign in Congress to obtain votes for his bill, Mr. Craney sent to each Congressman and United States Senator, the following circular reproduced on pages 72 and 73 hereof:

(Here follows one photolithograph, side folio 159)



**CAN**

**YOU**

**BE**

**REFLECTED?**





[fol. 160]

April 27, 1937.

Your reelection will depend upon your being heard by people in your own state. To reach your constituents you must use the Independent broadcasting stations in your state, not one of the big national networks, as that would be impractical. To insure free speech these independently operated broadcast stations are very necessary. If you are going to protect and perpetuate these independent stations, you should read All of the attached. It was sent you in February and many of you read it. I call your attention to the fact, that although Mr. Mills of ASCAP in his letter of January 27th asked for suggestions to improve the relationship between his group and independent broadcasters, and although these suggestions were given under date of February 5th, Mr. Mills evidently was acting in Very Bad Faith because to date nothing has been heard from him.

Congress—

The Independent Broadcasters of the United States Ask Your Cooperation. Please Familiarize Yourself With Our Problem. Kindly Read the Attached and Then Take Action.

[fol. 161] Similar instances may be multiplied of "high pressure" methods used upon legislators by broadcasters who control an instrumentality that is so very powerful in helping to form public opinion and thus determine whether or not candidates for office should be elected.

Radio, which is a medium for great good, has been subverted to the selfish ends of users of music to help free them from the duty of paying for the one medium without which radio could not exist—music.

Although the State Statute purports to give to complainants and others similarly situated the right to fix a price for the public performance for profit of their copyrighted musical compositions, within the limits of the Statute, the creator of the work or the owner of the performing rights is prevented from licensing such right apart from the sale of the physical copies of particular copyrighted musical compositions. In actual operation this would result in denying composers and authors any compensation for this form of use of their respective creations, and would in effect destroy that particular right vouchsafed to them under the Copyright Acts since 1897.

The Statute not only attempts a system of compulsory price-fixing, but reaches out extraterritorially and compels the copyright owner to modify existing contracts with radio broadcasting stations beyond the State of Florida, or, in the alternative, to forego the right to collect from users in Florida for a license to publicly perform his works for profit, or to forego his right to treat as infringers owners of radio broadcasting stations or motion picture houses or theatres, who publicly perform for profit these copyrighted [fol. 162] works without the consent of such copyright owner.

Many request numbers are played as spontaneous encores in the course of an evening's entertainment in dance halls, cabarets, hotels, etc., and occasionally on radio. This is possible only under some form of blanket license. Blanket licenses allow radio stations to make last minute substitutions made necessary by operating difficulties, failure of artists to show up, etc.

It is difficult to report accurately the music performed, the writers, publisher and copyright owner of each. Large stations with expert staffs are unable to report entirely accurately, and it is inevitable that small stations would have greater difficulty because of lack of facilities.

By the use of the reservoir of available music, under a blanket license, there are saved expenditures that would be entailed if each musical composition had to be separately applied for and cleared and reported.

Apart from broadcasting, the Society has been unable to procure any return as to the compositions played by the user. In some cases, music is played by ear; in others, the performers themselves cannot or will not supply the details.

The amounts paid to the Society by the users of music in Florida for the public performance for profit of all the musical compositions of approximately 4,000 composers, average for 1936, approximately:

Radio broadcasters, \$2,432.00 per year, per station.

Motion picture theatre exhibitors, \$81.00 per year, per theatre.

[fol. 163] Restaurants, \$84.00 per year, per establishment.

Hotels, \$80.00 per year, per hotel.

Dance halls, \$85.00 per year, per dance hall.

Miscellaneous establishments, \$103.00 per year, per establishment.

If these establishments were required to maintain a system of inspection and accountancy and bargaining for each composition and to report the same, the expense which would be imposed upon each establishment for such purposes would obviously greatly exceed the average license fee paid by such establishment to the Society.

About six or seven years ago, Warner Bros. Pictures, Inc., an outstanding producer of motion pictures, purchased the entire stock interest of a number of well known music publishing firms in New York, the principal ones being M. Witmark & Sons, Harms, Inc. and Remick Music Corporation. These companies were approximately of the same size as the complainant, Irving Berlin, Inc. Warner Bros. paid \$11,000,000 for the ownership of these corporations. That gives some indication of the value of the catalogues of the three publisher complainants herein, all of which are prominent publishers—Irving Berlin, Inc., one of the leading publishers of popular music, Carl Fischer, Inc., and G. Schirmer, Inc., being two of the leading publishers in the country of classical and standard musical compositions.

The reason why an order to show cause is prayed for is because the State Statute was enacted in June, 1937 and was signed by the Governor of Florida on or about June 9th, 1937 as an emergency measure, and has gone into effect. If the operation of the Statute is not restrained, complainants [fol. 164] will be compelled to forego their valuable rights under their contracts by threat of forfeiture and confiscation, as well as by threat of the enforcement of the criminal provisions of the Act.

The season during which the copyrighted music of the complainants is most frequently publicly performed for profit in the State of Florida is about to commence, and a temporary injunction is necessary in order to protect complainants against unlimited infringement of their copyrighted compositions. The season is very brief, extending from approximately the present time, to the fifteenth of April.

A motion for an injunction was not made sooner because the complainants felt that a decision might be rendered in the interim by the Statutory Courts in Washington and Montana. Although the statutes in those two states differ in some respects from the Florida statutes (but having essentially the same objective) it was felt that decisions in those States would be of help to this court in disposing of



the issues raised in the instant case. No decisions have been rendered, however, by the courts of Montana and Washington, and since the Florida season is now under way, a motion for temporary injunction is both timely and urgent.

Wherefore, I respectfully pray that a temporary injunction issue, as prayed for in the bill of complaint.

Gene Buck.

Sworn to before me this 21st day of January 1938.  
Marian Elkin, Notary Public New York County.  
Com. Expires March 30, 1939. (Seal.)

[fol. 165] EXHIBIT "I" TO AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND  
FOR THURSTON COUNTY

No. 16114

STATE OF WASHINGTON ex Rel. G. W. HAMILTON, Attorney-  
General, Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,  
an Unincorporated Association, et al., Defendants

# DECREE

Filed Superior Court, Thurston Co., Wash., June 8, 3:01  
P. M. 1936. Ellis C. Ayer, Clerk, by Edwidge LaFond,  
Deputy

This matter coming regularly on before the court for a hearing upon the petition of the defendant, American Society of Composers, Authors and Publishers, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

It is Now Therefore Ordered, Adjudged and Decreed as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"),

a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a convenience and necessity to the users of music in obtaining the performing rights.

[fol. 166] 3. That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.

4. That the Society was formed for lawful purposes and that the plan being used by the American Society of Composers, Authors & Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors & Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not violative of any of the laws of the State of Washington, or of the Constitution.

5. That the Society serves a beneficial and useful purpose as a clearing house through which users may obtain and clear performing rights in musical compositions.

6. The receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid direct to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annul-ed, and any and all such assignments of copyright or rights in copyrights are hereby canceled and annul-ed, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

[fol. 167] 9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. That the complaint herein be dismissed upon the merits.

11. It is further Ordered, Adjudged and Decreed that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

Done in open court this 8th day of June, 1936.

(Signed) D. F. Wright, Judge.

[fol. 168]

## EXHIBIT "J" TO AFFIDAVIT

## Nebraska Opinion

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity. No. 562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; et al.,  
Complainants,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants

## MEMORANDUM OPINION

Per CURIAM:

The plaintiff, Gene Buck, as an individual and as President of the American Society of Composers, Authors and Publishers, brought suit against Harry R. Swanson, as Secretary of State of Nebraska and against certain other state and county officials, seeking to enjoin the defendants from enforcing the provisions of an act of the legislature of Nebraska, approved May 17, 1937 (Nebraska Session Laws 1937 page 488). That Act makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization, either in Nebraska or elsewhere, if one of the objects of the organization is the determination of license fees required for the use of copyrighted [fol. 169] musical compositions for profit in Nebraska, for the purpose of preventing free competition between different copyright owners. There are provisions penalizing any attempt to collect license fees by owners of copyright, and requiring any author, composer or publisher, to specify on any published musical composition prepared for use in Nebraska, the selling price of such composition. Many other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their



products in the state of Nebraska. The plaintiffs have alleged that the enforcement of the Act will violate rights granted to them by the Copyright Act of Congress (17 U. S. Code Section 1 et seq.), and that the Act is in violation of Section 8 of Article 1 of the Constitution of the United States, and also impairs the terms of existing contracts held by the plaintiffs.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act, to the great damage of the plaintiffs unless restrained by an order of this court. The application for a temporary injunction has been submitted upon the complainants' bill, and upon certain affidavits filed, and also upon the defendants' motion to dismiss the bill of complaint.

On consideration of the bill, it appears that there is a grave doubt of the constitutionality of the Act of the Legislature, and the plaintiffs have shown that serious and irreparable injury will be inflicted upon them if a preliminary injunction is not awarded to them and that the plaintiffs have no adequate remedy at law. A preliminary injunction, upon the usual terms, will protect both parties, pending a final decision. An order will, therefore, be entered granting a preliminary injunction. The motion to dismiss the plaintiffs' bill will also be denied.

[fol. 170]

EXHIBIT "K" TO AFFIDAVIT

Nebraska Decree of Temporary Injunction

In the District Court of the United States for the District of Nebraska, Lincoln Division

Equity. No. 562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,  
Complainants,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et al.,  
Defendants

Order

This cause to be heard at this term (under section 380, Title 28, U. S. C. A. Judicial Code, Section 266) and the Court

sat as provided therein, and the cause was argued by Counsel; thereupon, upon consideration thereof, it was ordered and adjudged as follows:

## I

That the motion made by the complainants for temporary injunction be and the same is hereby in all respects granted.

## II

That the defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, Walter H. Jensen, individually and as State Treasurer of the State of Nebraska, William H. Price, individually and as Auditor of Public Accounts of the State of Nebraska, Richard O. Hunter, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County, State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County, State of Nebraska, Grace Bailard, individually and as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County, State of Nebraska, Charles H. Hood, individually and as County Attorney of Saunders County, Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, individually and as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County, State of Nebraska, Edward Moran, individually and as County Attorney of Otoe County, State of Nebraska, and the respective agents, servants and employees of each of them and all other persons acting under or through the authority of each of them or by virtue of the authority of the office of each of them, be and they are each of them severally enjoined and restrained pendens lite and until the further order of this Court from bringing directly or indirectly and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing or executing the State of Nebraska known as Legislative Bill No. 478, passed by the 52nd Session of the Legislature of Nebraska and signed by the Governor on

May 17, 1937, and made effective immediately (said Statute hereinafter referred to as "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated be filed, and from bringing any action or proceeding to adjudicate the ownership of copyrighted musical compositions owned by the corporate or individual complainants or others similarly situated, [fol. 172] and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with any and all existing contracts heretofore entered into between complainants and citizens and residents of the State of Nebraska, and between the American Society of Composers, Authors and Publishers and the other complainants or any of said Society's members, and between the American Society of Composers, Authors and Publishers and similar societies located in foreign countries, and between the complainant composers and authors and their respective publishers, and between the complainant publishers and their respective authors and composers, and from threatening to enforce against any citizen or resident of the State of Nebraska the penalties of such State Statute in the event such citizen and resident desires to carry out their contracts with the said American Society and other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated, for doing any Act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry on or enforce any of the provisions of said State Statute.

### III.

That the motion made by the defendants herein against the Bill of Complaint herein be and the same is hereby in all respects denied.

### IV

That the defendants be given thirty days from the date hereof to answer herein.

[fol. 173] . . .

V

The Court finds that unless an injunction order of this nature be issued that plaintiff would be irreparably damaged and that plaintiffs have no adequate remedy at law.

This order is made conditional upon the filing herein within thirty days of an approved bond by the plaintiff in the penal sum of Five Thousand (\$5,000.00) Dollars, conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order, such damages to be ascertained as the Court may direct.

Dated November 10, 1937.

Archibald K. Gardner, United States Circuit Judge.

Dated November 13, 1937.

Thomas C. Munger, United States District Judge.

James A. Donohoe, United States District Judge.

(Filed and entered on Saturday, November 13, 1937.)





## NEBRASKA STATUTE

## LEGISLATURE OF NEBRASKA

## FIFTY-SECOND SESSION

**Legislative Bill No. 478*****(Final Form on Third Reading)*****A BILL**

FOR AN ACT relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination

as here declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representative members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Introduced by Frank J. Brady of Holt.

Introduced and read first time February 15, 1937. Read second time  
February 16, 1937.

Referred to committee on Judiciary.

Sent to printer February 16, 1937.

Final Form Sent to Printer May 12, 1937

*As Enacted By The People of The State of Nebraska:*

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities or the



officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance or through radio, or any instrumentality or sound producing apparatus shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted under the provisions of this Act, it shall be *prima facie* evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, 320 Section 1 (e). 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial

6 number or numbers of other authors, composers and publishers, and  
7 also independently of any such combination as in Section 1 hereof de-  
8 clared unlawful, in determining and fixing the price to be charged for  
9 the use or rendition of his copyrighted musical compositions within this  
10 state, and the author, composer or publisher, or his, her, or its heirs,  
11 successors or assigns, shall specify or cause to be specified legibly upon  
12 the musical composition, in whatever form the same may be published,  
13 printed, manufactured or otherwise prepared for use or rendition with-  
14 in this state, the selling price thereof for private rendition or public  
15 rendition for profit if made available for such public rendition so ar-  
16 rived at and determined for all uses and purposes; and when any pur-  
17 chaser or user acquires the same within this state and pays the selling  
18 price so specified thereon to the seller or publisher of said copyrighted  
19 musical composition, then said purchaser or user may use or render, or  
20 cause or permit to be used or rendered within this state, the said copy-  
21 righted musical composition by persons individually or with other per-  
22 formers, actors and singers, or by an individual instrument player, or  
23 by orchestras and bands, or over or through or by means of radios,  
24 loud speakers, radio receiving, radio broadcasting and radio re-broad-  
25 casting stations, electrical transcriptions, musical records, sound ap-  
26 paratus or otherwise within this state, and the same may be so ren-  
27 dered either privately or publicly for profit when so purchased and paid  
28 for without further license fees or other exactions; and such copyright  
29 owner or proprietor, in the event of such payment, shall be deemed  
30 to have received full compensation for the rendition and all uses of  
31 such musical compositions for private purposes or for public perfor-  
32 mance for profit by such purchaser within this state.

33 (B). In the event any author, composer or publisher, or any of  
34 his heirs, successors or assigns, fails or refuses to affix on the musical  
35 composition the selling price, and collect the same, for private and  
36 public performances for profit, at the time and in the manner specified  
37 in this Act, then any person, firm or corporation in this state who may  
38 have purchased and paid for such copyrighted musical composition  
39 may use the same for private or public performance for profit within  
40 this state without further license fee or other exaction; and such per-

son, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firms or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the state Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such

unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this



31 state, shall be deemed guilty of a violation of the provisions of the  
32 Act; and such person, firm or corporation from without this state  
33 hereby declared to be an agent and representative of such combination  
34 as declared illegal and unlawful by Section 1 hereof, and shall be sub-  
35 ject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, lease  
2 operates or manages any theatre or theatres, moving picture house  
3 or houses, or a similar place or places for amusement and public per-  
4 formance within this state, shall be and is hereby authorized to re-  
5 ceive, use and render, or cause to be received, used and rendered within  
6 this state, by the personal performance of artists, singers, musicians,  
7 orchestras, bands, or actors, or by loud speakers, radio, sound produc-  
8 tion or re-production apparatus or instrumentalities, or electrical  
9 transcriptions, or by any other means of rendition whatsoever within  
10 this state, by the personal performance of artists, singers, musicians,  
11 copyrights of which are owned or controlled by any such combination  
12 declared unlawful by Section 1 hereof, without the payment, to such  
13 combination, or to its agents, representatives or assigns, of any license  
14 fee or other exaction declared illegal and non-collectible by the terms of  
15 this Act.

16 (B). When such theatre or theatres, moving picture house or  
17 houses, or other places for amusement or performance within this state  
18 is or are affiliated or under contract in any manner whatsoever with  
19 any other person, firm or corporation furnishing in any form or man-  
20 ner copyrighted musical compositions from outside this state, or sup-  
21 plying such persons, firms, or corporations in this state with radio  
22 broadcasts or electrical transcriptions, sound production instrumental-  
23 ties or apparatus, or artists, performers, musicians, singers, players, or  
24 orchestras, bands or other artists or talent, wherein or whereby copy-  
25 righted vocal or instrumental musical compositions are privately or  
26 publicly rendered for profit, then such person, firm or corporation out-  
27 side this state shall be and is hereby prohibited from in any manner  
28 charging or attempting to charge, or collecting or attempting to col-  
29 lect within this state, from any such person, firm or corporation who  
30 owns, leases, operates or manages such theatre or theatres, moving picture

ture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through

21 such affiliate or affiliates, then any defendant in such action may in-  
22 terplead such affiliate or affiliates in such action; and any judgment  
23 which may be rendered in favor of the copyright owner shall be paid  
24 and satisfied by such affiliate or affiliates; and, if paid or satisfied by the  
25 defendant user in this state, such defendant shall be subrogated in said  
26 action or otherwise to all rights of the plaintiff in said judgment as  
27 against said affiliate or affiliates, whether the latter is or are a party  
28 or parties in said action or not; and in any event such affiliate or affil-  
29 iates shall be liable to such user to the full extent of his liability to  
30 such copyright owner, in the absence of any agreement to the contrary;  
31 and any combination declared unlawful by Section 1 of this Act  
32 which is the owner or proprietor of or controls the copyrighted vocal  
33 or instrumental musical compositions, its agents or representatives  
34 shall be and are hereby prohibited from suing for infringement, loss or  
35 damage within the boundaries of this state, for the use or rendition  
36 of such copyrighted vocal or instrumental musical compositions so  
37 originating or emanating because such persons, firms or corporations  
38 used, rendered or performed the same within this state; the use or  
39 renditions by radio broadcast, radio re-broadcast or sound pro-  
40 ducing instrumentalities or apparatus, or electrical transcription, or  
41 by the personal performance of singers, players and musicians sent  
42 into this state, or otherwise, of such copyrighted musical compositions  
43 within this state in the manner set forth in this section, shall be con-  
44 sidered, for the purpose of this Act, as intrastate business of this  
45 state and subject to the control, regulation and prohibitions set forth  
46 in this Act notwithstanding that such copyrighted musical composi-  
47 tions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state  
2 who shall act as the representative of any combination herein declared  
3 unlawful as defined in Section 1 hereof, shall, for the purpose of this  
4 Act, be deemed an official representative and agent of such unlawful  
5 combination and shall be construed to be doing business within this  
6 state, and service of any process against such combination may be  
7 had upon such representative or the agent of any such representative  
8 as herein defined within this state; and when so served, such process

shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who act as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than \$5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party



15 aggrieved, because of the violation of any of the terms of this Act  
16 anywhere within this state, shall proceed in the District Court in any  
17 county in which all or any part of the offense or violation was com-  
18 mitted, to institute action against any combination defined as unlaw-  
19 ful by Section 1 hereof, and against the representatives or agents of  
20 any such combination, either in a criminal action to enforce the pe-  
21 alties hereof, or in a civil action to enforce all rights hereunder, or  
22 to dissolve any such combination as declared unlawful by Section  
23 1 hereof, or he may proceed by both civil and criminal actions; in  
24 such action or actions, the plaintiff shall be the State of Nebraska;  
25 and any interested party may, upon application, be granted leave to  
26 intervene in such a civil action.

27 (D). The District Court shall, in such dissolution or other civil  
28 suit, upon the application and intervention in said action of any  
29 member, stockholder or other interested party of said unlawful com-  
30 bination, adjudicate the ownership of any copyrighted vocal or instru-  
31 mental musical composition theretofore owned or controlled by said  
32 unlawful combination; and furthermore, such District Court shall  
33 have and is hereby granted the power and authority to appoint a re-  
34 ceiver and to issue injunctive and mandatory temporary and permanent  
35 orders in reference to any of the issues involved in such action; and  
36 any person, firm or corporation within this state who is a user in  
37 any manner of any copyrighted vocal or instrumental musical com-  
38 positions theretofore owned or controlled by such unlawful combina-  
39 tion may, upon application, intervene in such action and therein have  
40 adjusted, determined and adjudicated all rights for or against the  
41 person, firm or corporation whom the Court shall finally determine  
42 to be the owner or proprietor of such copyrighted vocal or instrumental  
43 musical compositions; and said parties shall be permitted no other  
44 remedy in any other court within the boundaries of this State, whether  
45 the same be for damages, infringement or otherwise until final decree  
46 has been had in said action determining the ownership and terms for  
47 use of such copyrighted musical compositions.

Sec. 10. (A). Any person, firm or corporation within this state

aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case; and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant

18 or defendant to furnish and file such information as ordered.  
19 copy of said order shall be mailed to each defendant at his or  
20 last known address, which shall be deemed sufficient notice and service  
21 upon said defendant or defendants; or the same may be served by  
22 mail in the same manner upon each attorney of record for the defend-  
23 ant or defendants, and when so served, the same shall be deemed  
24 notice and service upon the defendant or defendants for whom said  
25 attorneys appear of record.

26 (B). If said defendant or defendants shall fail to furnish plain-  
27 tiff or his or its attorney, or file with the Clerk of the Court in which  
28 the action is pending, said copy or copies of said documentary evidence,  
29 facts, figures, records, books and data as set forth in said order within  
30 the time specified in said order, the Court shall adjudge said defend-  
31 ant or defendants guilty of contempt of court, and the Court shall assess  
32 a fine of \$100.00 against such of the defendants for each and every  
33 day that such defendant or defendants fails to comply with said order,  
34 and judgment shall from time to time be rendered therefor, and the  
35 plaintiff may collect the same against the defendant or defendants with  
36 6% interest thereon and the costs, including expenses and attorney  
37 fees to be fixed by the Court, in the same manner as other judgments  
38 are collected in this state. The Court shall find and determine when  
39 the judgment is rendered what disposition shall be made of the proceeds  
40 collected after the payment of costs, expenses and any attorney's fees  
41 that may be allowed.

Sec. 12. If any section, sub-division, sentence or clause in this  
2 Act shall, for any reason, be held void or non-enforceable, such de-  
3 cision shall in no way affect the validity or enforceability of any other  
4 part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any  
2 other law or parts of laws in reference to any of the matters contained  
3 in this Act; and the rights and remedies and provisions herein provided  
4 shall be and are hereby declared to be cumulative to all other rights  
5 remedies and provisions now provided under the laws of the State of  
6 Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.





[fol. 189] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER S. FISCHER

Walter S. Fischer, being duly sworn, deposes and says:

I am President of Carl Fischer, Inc., one of the complainants herein, and have been associated with that company [fol. 190] for thirty-eight years. The firm was founded by my father in 1872.

I reside at Darien, in Fairfield County, State of Connecticut.

Carl Fischer, Inc. is one of the largest publishing houses of classical music in America, whose principal place of business has always been and still is in the City, County and State of New York.

Over the years it has published many thousands of musical compositions. At the present time a substantial portion of these is still being published and most of these compositions are protected by United States copyrights.

I have read the annexed affidavit made on behalf of Irving Berlin, Inc., one of the complainants, and believe that the statements therein contained with respect to the conduct of the music publishing business and the hardships that would be entailed if the State Statute of Florida were enforced, are true and correct, and apply with equal force to this complainant.

The catalogue of this complainant depends upon the value of the copyrights and the rights which the complainant enjoys under the Copyright Act.

Under the State Statute, each publisher would be required to specify legibly upon each copy of the copyrighted musical composition published by him, a specific selling price for all users including the public rendition for profit.

The State Statute effectively deprives this complainant and other copyright owners of the right to perform the copyrighted work publicly for profit given by Section 1E [fol. 191] of the Copyright Act. The obvious purpose of the Statute is to enable the copyright owner to obtain a share of the profit made from the performance of his work. At any time during the term of copyright, the copyright owner may grant absolutely or conditionally, or completely

withhold such right. He may fix his own terms." It is often to the advantage of my company and other publishers to sell sheet music only for private or non-profit public performance, and purchasers of the sheet music may freely use the work for these purposes. Under the State Statute I lose that right. I am compelled at once, upon the sale of the first copy of sheet music in the State of Florida, to give an unrestricted license to perform the work publicly for profit and to make other uses. It is impossible for me to print the price for all uses upon the sheet music, because if such a price would approximate adequate compensation for those uses, it would make the price for the sale of sheet music prohibitive, and my company and other publishers would have to discontinue the shipment of sheet music into the State of Florida. The sale of sheet music has at all times been kept separate and apart from the licensing of public performance for profit. Sheet music has always been sold to purchasers regardless of whether they wished to secure a license to perform it publicly for profit or not, and in like manner licenses for the public performance for profit have been issued regardless of whether the licensee had purchased the sheet music or not. The same practice has obtained in the sale of phonograph records and music rolls. The separability of these rights is recognized by Sec. 41 of the Copyright Act. But that separability without which the right of public performance for profit cannot [fol. 192] be enjoyed has now been completely destroyed by the State Statute.

With respect to the right of public performance for profit, no uniform fee can be fixed for all who choose to publicly perform for profit the particular copyrighted musical composition. It would be utterly impossible to print upon each copy of the musical composition the selling price for public performances for profit.

Even if the State Statute permitted the copyright owner to fix a separate price for each purchaser depending upon the extent of his proposed use of the musical composition in public performance for profit this would require printing on each musical composition the name of each establishment publicly performing for profit copyrighted music in that State, and the price to be charged for the public performance for profit in each such establishment. In the State of Florida, there are 367 establishments now having a license

from the Society to publicly perform for profit all the copyrighted musical compositions copyrighted by members of the Society and the members of affiliated societies.

The number of licenses and the establishments publicly performing copyrighted musical compositions in the State of Florida and elsewhere, is constantly changing.

The nature of the use in particular establishments changes from time to time. Such establishments are enlarged or made smaller. The nature of the performance may become more or less lavish. The number of people frequenting the place and observing or listening to the performance constantly changes. The investment of the owners in such establishments, as well as the ownership thereof, is constantly changing.

[fol. 193] This Statute would require the publishers of copyrighted music to fix a price upon the initial publication of the work. The purchase of a sheet of music would confer a license for a period of twenty-eight years, and a renewal period of the same length, and the price fixed on the initial publication would have to remain constant for a period of twenty-eight years, and renewal unless all copies of the musical composition printed especially for distribution and sale in the State of Florida, were periodically withdrawn and destroyed and new copies printed; properly reflecting the situation existing at the particular time.

Even though such an attempt were made to withdraw periodically all copies of musical compositions in Florida, it would serve no useful purpose, inasmuch as all users who had purchased copies of such compositions and had paid the price printed thereon, could enjoy the public performance for profit of such compositions for the balance of the copyright period of twenty-eight years and renewal.

The effect of the Statute is to nullify the right of public performance for profit granted under the Copyright Law, insofar as the same might otherwise be enjoyed in the State of Florida.

Furthermore, in order to attempt compliance with the Statute, it would be necessary to make a constant investigation of the number of places in Florida where the copyrighted works of this complainant are used or are likely to be used, in public performances for profit; which would entail the expense of maintaining a staff of investigators



[fol. 194] and would require the establishment of a permanent agency in the State, the expense of which would be far in excess of \$10,000.00 per year.

The composers, authors and publishers who are members of the American Society of Composers, Authors and Publishers, have, since 1914, adopted a method for the equitable distribution of all moneys received by the Society from the public performance for profit of the works created by the composer and author members of the Society and published by the publisher members, who, in most instances, are the owners of the copyright.

The scheme of the State Statute would require the publisher, who has the sole right to print and sell copies of the copyrighted musical compositions, to fix a price for all uses including the public performance for profit. This would impose a hardship upon the publisher.

All this trouble and expense and the legal complications which are known as well to the users of music as to the creators and copyright owners, are made necessary by this Statute, only, in an effort to free copyrighted works from the requirement of the Copyright Act, that such works shall not be publicly performed for profit except with the consent of, and appropriate payment to, the owners of such copyrighted works.

Complainant publishes standard and classical music as distinguished from popular music; its musical compositions [fol. 195] have a perennial appeal, and there is always a very substantial demand for them. It publishes orchestration and band music, chamber music, vocal and instrumental music, choral works, cantatas, symphonic works and books of instruction for all instruments, and musical compositions written and composed by eminent musicians, and expends moneys far in excess of \$10,000 per annum to advertise and exploit its musical works in the United States, and has expended over \$500,000, during the last sixty years, in advertising and exploitation. It expends far in excess of \$10,000 per year for arrangements, and employs many arrangers for the purpose of making various arrangements of its compositions.

The gross business done by this complainant has been very substantial for upwards of sixty years. For the year 1936, the gross business amounted to a substantial sum, far in excess of \$150,000, and for the past five years, it has averaged far in excess of \$100,000 per year.

Complainant's contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940, a copy of which is annexed to the complaint, was lawful in the State of New York, when made, and is presently in full force and effect and is of great value to this complainant; under this contract, this complainant received from the Society a sum in excess of \$50,000 during each of the past five years, and will continue to receive sums in [fol. 196] excess of \$50,000 for each year during the balance of said contract period, and the value of this contract to this complainant is in excess of \$200,000.

If complainant were to attempt to comb its entire catalogue and endeavor to ascertain a price for each use or all uses of each of its compositions, for each or all establishments in Florida, with respect to the many varied circumstances which must be considered in fixing such prices, a vast amount of research work would be entailed and complainant would be compelled to expend large sums of money, in my opinion, an amount in excess of \$25,000 and complainant would have to continue such expenditures for the purpose of fixing a price commensurate with changing conditions in a particular state.

If the name of any user of music in Florida were omitted, such user would have the right to perform publicly for profit complainant's musical compositions without making any payment whatsoever therefor, except paying the same price for the purchase of a copy of the musical composition that people are accustomed to pay who simply use the composition for private entertainment in their own homes.

Complainant also copyrights many of its musical compositions under Section 11 of the Copyright Act, and the rights and privileges which it possesses under said Act [fol. 197] would be interfered with by the enforcement of this State Statute.

Walter S. Fischer.

Sworn to before me this 21st day of January, 1938.

Marion L. Elkin, Notary Public, New York County.  
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.  
Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.  
22, Reg. No. 9090. Commission expires March 30,  
1939.

[fol. 198] IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF SAUL H. BORNSTEIN

Saul H. Bornstein, being duly sworn, deposes and says: I am the Treasurer of Irving Berlin, Inc., one of the complainants herein, and have been associated with that company [fol. 199] for 18 years.

I reside at No. 14 East 75th Street in the Borough of Manhattan, City and State of New York.

I have been in the music business for the past 20 years, and have a thorough and intimate knowledge of the business and a wide acquaintanceship with all the leading authors, composers and publishers, and am familiar with the customs and usages of the business and with the manner of its operation.

Irving Berlin, Inc. is one of the largest music publishing houses in America. It has been engaged in business for upwards of twenty years, and its principal place of business is in the City, County and State of New York.

This corporation has contracts with a great many prominent and successful authors and composers besides which it has the exclusive right to publish the works of Mr. Irving Berlin. Over the years, it has published and copyrighted thousands of musical compositions, many of which have been extremely successful.

The ownership in these musical compositions and in the copyright thereof constitutes the catalogue of Irving Berlin, Inc. The entire business of this company depends upon the size of the catalogue, its entertainment value, the prestige of the writers and composers, the public demand for particular compositions, the permanency of such demand, and other elements, all of which go to make up the value of the catalogue, and, of course, the value of the business. The entire value of the catalogue and the business depends [fol. 200] upon the right of Irving Berlin, Inc. to exercise all the exclusive rights granted to it under the Copyright Law with respect to these compositions. Anything that interferes with the right of this complainant to exercise the rights granted to it under the Copyright Act with respect to each and every one of these compositions or to the catalogue as a whole, and with respect to each of the separate

uses recognized by and protected under the Copyright Law adversely affects the business of the complainant.

During the many years that this complainant has been in business, it has expended large sums of money in exploiting its compositions. Each year it has expended far in excess of \$25,000 for the purpose of making these compositions well known, popular and pleasing to the public in an effort to create a demand for its catalogue. In the aggregate, this complainant has expended far in excess of \$250,000 for that purpose.

In 1936, this complainant entered into a renewal contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940 (which is identical in form with the contract Exhibit "B" attached to the complaint herein). That contract was lawful in the State of New York when it was made, and is presently in full force and effect, and is of great value to this complainant. Under that contract this complainant received, in 1936, a sum of money in excess of \$50,000 from the Society by way of royalties; and this complainant has received a sum many times in excess of \$50,000 from said Society during each of the past five years, and will continue to receive sums in excess of \$50,000 yearly for the balance of said [fol. 201] contract period and the value of this contract to complainant is in excess of \$200,000.

The catalogue of this complainant has a present value, in my opinion, far in excess of \$1,000,000 based upon the factors considered in fixing the value of a catalogue such as the size and extent of the catalogue, the previous earnings of the corporation, the amount received from the said Society, the gross business done by the corporation, and the amount received by other prominent publishing firms upon the sale of their catalogues within the last seven or eight years.

The State Statute attempts to nullify the complainant's existing contract with the American Society by compelling this complainant to forego and surrender its right to separately license the public performance for profit of its copyrighted musical compositions, and requiring this complainant to grant to all purchasers of a copy of such musical compositions a license to perform publicly for profit such compositions merely upon the payment of the sum fixed for the sale of the sheet of music.



Since the complainant's contract with the said Society is a valid and subsisting contract, the complainant is in no position to come into the State of Florida free of any combination and comply with the said Statute. It is in a position where it is declared by the State of Florida to be operating illegally and unlawfully against its Statute.

To attempt to ascertain the information necessary to affix the price of uses and to stamp the same upon each sheet of music to collate it and to keep it accurate and up to date, would involve this complainant in an initial expenditure far in excess of \$25,000, and in annual expenses thereafter [fol. 202] in excess of \$10,000, because it would entail the services of a large staff of clerks and investigators.

It is to be borne in mind that with respect to these musical compositions, there are arrangements being made from time to time. A popular composition has not only a piano arrangement, but it has an orchestral arrangement,—a separate arrangement for each instrument of the orchestra. Very frequently, new arrangements of very popular compositions are made from time to time, particularly, with respect to time and rhythm; sometimes quartettes, trios and duets are arranged; sometimes arrangements for special vocal parts. Each of these arrangements is copyrighted separately, as is the custom in the music business, and as required by the Copyright Act, and each arrangement may have a separate history with respect to license, ownership, restrictions and foreign rights, as well as renewals.

Complainant would have to fix a separate price for all uses of each copyrighted arrangement; for example, there would have to be a price for a piano arrangement, for a violin arrangement, for a cello arrangement, and other instruments of the orchestra, often ranging as high as forty different arrangements. There would be no way by which the complainant could issue a single license for the performance by an orchestra of ten, as distinguished from a performance by an orchestra of fifty. Obviously the compensation to the copyright owner should be different in one than it is in the other.

In actual practice it is impossible to fix a price for a particular performance of a particular copyrighted musical [fol. 203] composition, and it is for that reason that the issuance of blanket licenses has been adopted as the only

feasible way of licensing the public performance for profit of musical compositions.

There are all sorts of uses and all sorts of places where the uses are made. All of these factors must be taken into consideration for the purpose of arriving at a true estimate of the use value of a composition. There must be constant investigation into the manner in which a particular composition is used, including investigation of the places where the music would be used, the nature of the use, the character of the artists involved in the performance, the extent of the use, the nature of the audience reached. To properly ascertain such information a very considerable sum of money would have to be expended by the complainant with respect to each of its musical compositions, and the cost of so doing, would, in my opinion, far exceed \$25,000.

Moreover, there is a vast difference between the value of the various songs in the catalogue. Some are currently popular, some are not; and it would be a very difficult matter, in fact impossible, to ascertain with any degree of certainty, a true use value for each of our compositions.

Under the State Statute, it is mandatory that the complainant fix a price for all uses including the public performance for profit, upon each of its compositions. That would mean that the complainant would be compelled to comb its entire catalogue and endeavor to estimate a use value on each of its compositions.

[fol. 204] This would require the services of musical experts, as well as legal experts, and would require a vast amount of research work and the expenditure of large sums of money; in my opinion, an amount far in excess of \$25,000.

Furthermore, to enforce the State Statute would work a terrific hardship with respect to a great many musical compositions now owned by the complainant. For example: the complainant frequently copyrights musical compositions which it does not publish for a long time thereafter. This is done as a matter of sound business judgment, and is a recognized custom in the trade; and Section 11 of the Copyright Act recognizes the necessity for securing copyright on these compositions before publication, and provides that this may be done.

The State Statute takes away from the complainant its control of its own business. It does not permit the complainant to exercise control over its business, but permits

users in Florida to perform publicly for profit complainant's musical compositions in such users' establishments in perpetuity, for a price fixed under circumstances not within the knowledge, and beyond the control of complainant.

The complainant, having copyrighted a work under Section 11, often refrains from publishing the song to preserve other property in addition to the song. Many songs are performed, for the first time, as part of an elaborate musical show, musical comedy or operetta and works of similar nature. Obviously, such dramatic works, some of which represent an expenditure of hundreds of thousands of dollars in cost of production, must be protected. If the music is [fol. 205] indiscriminately broadcast and performed prior, or during the run of a production, it means that the public will have been surfeited with it and the demand for the song will have been exhausted. Thus the production in which the song appears will lose appeal and may become a failure.

For the foregoing reasons, the members of the American Society including complainant reserved the right to restrict from radio broadcasting, musical compositions currently being played in important productions.

Under the State Statute of Florida, it would be impossible to protect a musical production whose cost to the producer is sometimes as great as \$300,000 (cost of producing such musical plays is invariably between \$200,000 and \$300,000); and consequently, not only the complainant, but producers of plays using its musical works throughout the country, would be at the mercy of the user of a particular piece.

Very often the "hit" number of an important production is a song which complainant owns, and which has been interpolated in such a musical production as a separate number. For this the complainant receives special compensation. But that is done only when the complainant is able to assure the producer that the song will not be broadcast or otherwise performed during the run of the show, and possibly, even during subsequent periods, when motion pictures or road-shows based upon such production, are in progress. That valuable right is likewise destroyed by the State Statute for the reasons above explained.

The only alternative left to complainant under the Nebraska and Florida Statutes is to withdraw from the channels of interstate commerce all sheets of music which

[fol. 206] are now sent to those states and which complainant would continue to send to those states but for the provisions of those State Statutes and the reasons above stated.

Under the State Statute, if this complainant or the Society should give a license to a broadcaster in New York or in any other State, to broadcast from that particular station a particular copyrighted composition, all stations in Florida would have the right to re-broadcast such a performance without any license from the copyright owner and without being subject to the Copyright Laws of the United States under which such a user would be an infringer of complainant's copyright.

Complainant, standing alone, is helpless to detect infringements, throughout the country, of its copyrights. Its songs may be performed simultaneously in over 30,000 establishments throughout the United States, and the cost of detecting infringement and bringing suit would far exceed any royalties that it might collect, and certainly would exceed \$25,000 for the State of Florida alone. Infringers habitually challenge the title of complainant, the originality of the work, deny giving performance, deny performance was for profit and in other ways attempt to evade liability. They manoeuvre for delay and often succeed in postponing trials for three and four years. In the meantime, many establishments, thus sued, go out of business, and complainant is left without remedy. Such defense and such tactics require vigorous and able prosecution by skillful lawyers, well versed in the law of copyrights. This likewise entails large expense which can hardly be compensated for in the statutory damages and modest counsel fees awarded in cases where judgments are obtained and collected.

[fol. 207] It is only through an organization like the Society that these rights of complainant may be adequately protected.

Saul H. Bornstein.

Sworn to before me this 21st day of January, 1938.  
 Marion L. Elkin, Notary Public, New York County.  
 N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.  
 Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.  
 22, Reg. No. 9090. Commission expires March 30,  
 1939.



[fol. 208] IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF GUSTAVE SCHIRMER

Gustave Schirmer, being duly sworn, deposes and says:

I am Secretary of G. Schirmer Inc., one of the complainants herein, and have been associated with that company [fol. 209] for over thirty years.

I reside at No. 812 Park Avenue, in the Borough of Manhattan, City and State of New York. G. Schirmer Inc., is one of the largest publishing houses of classical music in America, whose principal place of business has always been in the City, County and State of New York.

Over the years it has published many thousands of musical compositions. At the present time a substantial portion of these is still being published and most of these compositions are protected by United States copyrights.

I have read the annexed affidavits made on behalf of Carl Fischer, Inc. and Irving Berlin, Inc., complainants, and believe that the statements therein contained with respect to the conduct of the music publishing business and the hardships that would be entailed if the State Statute were enforced, are true and correct, and apply with equal force to this complainant.

Complainant, G. Schirmer Inc. publishes standard and classical music as distinguished from popular music, and its musical compositions have a perennial appeal; there is always a very substantial demand for them. It publishes choral works, cantatas, symphonic works, books of instruction to music students and musical compositions written and composed by eminent musicians; it expends far in excess of \$10,000 per annum to advertise its musical works in the United States, and has expended over \$100,000 during the last thirty years in advertising. It expends in excess of \$10,000 per year for arrangements, and employs many [fol. 210] skilled and experienced arrangers for the purpose of making various arrangements of its compositions.

The gross business done by this complainant has been very substantial for upwards of thirty years. For the past five years it has averaged in excess of \$150,000 per year.

Complainant's contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940 (which is similar to the contract of Carl

Fischer, Inc., annexed to the complaint herein), was lawful in the State of New York, when made, is presently in full force and effect, and is of great value to this complainant; under this contract, this complainant received from the Society a sum in excess of \$50,000 during each of the past five years, and will continue to receive sums in excess of \$50,000 for each year during the balance of said contract period; and the value of this contract to this complainant is in excess of \$200,000.

If this complainant were to attempt to comb its entire catalogue and endeavor to ascertain and fix a price on all the uses or on each use of each of its compositions, a vast amount of research work and investigation would be entailed, and complainant would be compelled to expend large sums of money, in my opinion, in excess of \$25,000. Even after the expenditure of such an amount, there would be no assurance that the data would be complete or accurate and it would have to be constantly revised to meet changing conditions in each State.

This complainant also copyrights many of its musical compositions under Section 11 of the Copyright Act, and [fol. 211] the rights and privileges which it possesses under said Act would be interfered with by the enforcement of this State Statute.

Gustave Schirmer.

Sworn to before me this 21st day of January, 1938.

Marion L. Elkin, Notary Public, New York County.

N.Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.

Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.

22, Reg. No. 9090. Commission expires March 30,

1939.

[fol. 212]. IN UNITED STATES DISTRICT COURT

[Title omitted]

#### AFFIDAVIT OF ANNE PAUL NEVIN

Anna Paul Nevin, being duly sworn, deposes and says:

I am one of the complainants herein, and the widow of Ethelbert Nevin, who departed this life in 1901. He was [fol. 213] a pianist and composer, and his memory is one of the bright spots in American music. He was born in 1862 in Edgeworth, Pa., and in his comparatively short life

he composed some of the most famous songs in this nation. To have done nothing else than to have composed "The Rosary" and "Mighty Lak a Rose" would have been sufficient to have established his reputation.

In his lifetime, my husband never received any money whatever from the public performance for profit of his copyrighted musical compositions. It was not until I joined the American Society, long after his death, that I began to benefit from the royalties from the licensing for public performance for profit on his compositions.

With respect to many of the copyrights, the original term has expired and I have renewed the term of the copyrights in my name, as his widow, pursuant to the provisions of the Copyright Act.

I have been receiving substantial royalties from the Society, and since 1928 I have received in excess of \$4,000 each year from the Society as my participation in the licensing for public performance for profit of my husband's songs. This is a very substantial sum of money to me, and were it not for the Society I would not be in receipt of anything for these public performing rights. I depend for my livelihood chiefly upon this income from the Society.

Herewith is a list of the various works that my husband wrote from 1874 down to the time of his death, as well as the posthumous works published after his death, with the years in which they were published:

[fol. 214]	1874	
Lilian Polka .....		Piano
	1880	
Apple Blossoms .....		Song and Dance
	1881	
The Lovers (In the garden were leisurely walking) .....		Song
The Milk Maid (Shame upon you, Robin) .....		Song
	1886	
I once had a sweet little doll, dears .....		Song
Stars of the summer night .....		Song
Summer Longings (Ah! My heart is weary waiting) .....		Song
When all the world is young, lad .....		Song
	1887	
Bed-time Song (Sway to and fro in the twilight gray) .....		Song
Cradle Song (Sleep, baby, sleep) .....		Song

1888

## Op. 2, Sketch Book:

- |   |                                   |
|---|-----------------------------------|
| 1. Gavotte.....   | Piano                             |
| 2. Im wunderschönen Monat Mai ('Twas in the lovely month of May)..... | Song                              |
| 3. Love Song.....   | Piano                             |
| 4. Du bist wie eine Blume (Oh! fair, and sweet and holy).....         | Song                              |
| 5. Berceuse.....  | Piano                             |
| 6. Lehn' deine Wang (Oh! let thy tears fall fast with mine).....      | Song                              |
| 7. Serenata.....  | Piano                             |
| 8. Oh! that we two were maying.....                                   | Song                              |
| 9. Valse Rhapsodie.....   | Piano                             |
| 10. In winter I get up at night.....                                  | Song                              |
| 11. Of speckled eggs the birdie sings.....                            | Song                              |
| 12. Dark brown is the river.....                                      | Song                              |
| 13. The night has a thousand eyes.....                                | Mixed chorus and violin obbligato |

## Op. 3, Three Songs:

- |   |                                       |
|---|---------------------------------------|
| 1. Deep in a rose's glowing heart.....          | Song with violin and cello obbligati  |
| 2. One spring morning.....                      | " " "                                 |
| 3. Doris.....                                   | " " "                                 |
| Serenade (Good-night, good-night, beloved)..... | Song                                  |
| May Day Dance.....                              | Unison chorus, with piano 4-hand acc. |

[fol. 215]

1889

## Op. 4, Five Songs:

- |  |  |
|--|--|
| 1. Herbstgefühl (Autumn sadness).....                    | Song   |
| 2. Chanson des Lavandieres (What care I, unwilling)..... | Song   |
| 3. 'Twas April.....                                      | Song   |
| 4. Raft Song (From upwards my raft drifts down).....     | Song   |
| 5. Before the daybreak.....                              | Christmas Carol  |
| The Earth has Grown Old.....                             | Christmas Carol  |
| Everywhere, Everywhere, Christmas Tonight.....           | Christmas Carol  |
| Wynken, Blynken and Nod.....                             | Solo and chorus of mixed voices with piano 4-hand acc. |

1890

## Op. 6, Three Duets for the Piano:

- |                       |                   |
|-----------------------|-------------------|
| 1. Valse Caprice..... | Piano, four hands |
| 2. Country Dance..... | " " "             |
| 3. Mazurka.....       | " " "             |

## Op. 7, Four Pieces:

- |                           |       |
|---------------------------|-------|
| 1. Valzer Gentile.....    | Piano |
| 2. Slumber Song.....      | Piano |
| 3. Intermezzo.....        | Piano |
| 4. Song of the Brook..... | Piano |

- |  |                 |
|--|-----------------|
| Jesu, Jesu, Miserere.....                | Sacred Song     |
| The Silent Skies are Full of Speech..... | Christmas Carol |
| Nunc Dimittis.....                       | Mixed Voices    |
| Benedictus.....                          | Mixed Voices    |
| Jubilate.....                            | Mixed Voices    |



## 1891

- Op. 8, 1. Melody ..... Violin and Piano  
 2. Habanera ..... Violin and Piano  
 Une Vieille Chanson (If a lovely lawn there be) ..... Song  
 Barcarolle (The crimson glow of sunset fades) ..... Men's Voices

## Op. 12, Five Songs:

1. A Summer Day ..... Song  
 2. Beat upon mine little heart ..... Song  
 3. In a Bower ..... Song  
 4. Little Boy Blue ..... Song  
 5. At Twilight ..... Song

## Op. 13, Water Scenes:

1. Dragon Fly ..... Piano  
 2. Ophelia ..... Piano  
 3. Water Nymph ..... Piano  
 4. Narcissus ..... Piano  
 5. Barcarolle ..... Piano

[fol. 216]

## 1892

- The Rhine and the Moselle ..... Chorus of Men's  
 Voices

## Op. 16, In Arcady:

1. A Shepherd's Tale ..... Piano  
 2. Shepherds All and Maidens Fair ..... Piano  
 3. Lullaby ..... Piano  
 4. Tournament ..... Piano

## Op. 17, Three Songs:

1. Hab' ein Roslein (The Rosebud) ..... Song  
 2. Le Vase Brise (The Vase) ..... Song  
 3. Rappelle-toi (Remember well) ..... Song

## Op. 18, Two Etudes:

1. In the form of a Romance ..... Piano  
 2. In the form of a Scherzo ..... Piano

## 1893

- Barcarolle ..... Violin and Piano  
 Evening Song ..... Chorus of Mixed  
 Voices

- My Love ..... Chorus of Mixed  
 Voices

## Op. 20, A Book of Songs:

1. A Fair, Good Morn ..... Song  
 2. Sleep, little Tulip ..... Song  
 3. Ev'ry Night ..... Song  
 4. Airly Beacon ..... Song  
 5. When the Land Was White with Moonlight ..... Song  
 6. A Song of Love ..... Song  
 7. Nocturne (Up to her chamber window) ..... Song  
 8. Dites-moi (Tell me) ..... Song  
 9. Orsola's Song ..... Song  
 10. In the Night ..... Song  
 When Christmas Comes ..... Christmas Carol

## 1894

The Merry, Merry Lark	Song
La Vie (Life)	Song
Ti Salut (Thine my greeting)	Song

## 1896

## Op. 21, May in Tuscany:

1. Arlecchino	Piano
2. Notturmo (In Boccaccio's Villa)	Piano
3. Barchetta	Piano
4. Misericordia	Piano
5. Il Rusignuolo (In my neighbor's garden)	Piano
6. La Pastorella (Montepiano)	Piano

## Op. 22, Two Songs:

1. Rechte Zeit (Time enough!)	Song
2. Madel, wie bluht's (Maiden, how sweet)	Song

[fol. 217]

## 1898

The Rosary	Song
Life Lesson (There, little girl, don't cry)	Song
My Love's Waitin'	Song

## Op. 25, A Day in Venice:

1. Alba (Dawn)	Piano
2. Gondolieri (Gondoliers)	Piano
3. Canzone Amorosa (Love Song)	Piano
4. Buona Notte (Good Night)	Piano

March of the Pilgrims, for the Knight Templars. Piano

## 1899

## Op. 28, Songs from Vineacre:

1. A Necklace of Love	Song
2. Sleeping and Dreaming	Song
3. The Dream-maker Man	Song
4. Ein Liedchen	Song
5. My Desire	Song
6. The Nightingale's Song	Song
7. La Lune Blanche	Song
8. Ein Heldenlied	Song

Op. 29, Captive Memories. Bar. Solo, Solo Quartet and Reader; Song Cycle

## Op. 30, En Passant:

1. A Fontainebleau	Piano
2. In Dreamland	Piano
3. Napoli	Piano
4. At Home (A June Night in Washington)	Piano

## 1900

Memorial Day. Mixed Voices

## Posthumous Works

1901

An African Love Song	Song
Mighty lak' a rose	Song
To Anne	Song
At Rest	Song
The Woodpecker	Song
The Four Seasons	Mixed Voices

1902

O'er Hill and Dale	
'Twas a lover and his lass	Piano
The Thrush	Piano
Love is a-straying, ever since maying	Piano
The Lark is on the wing	Piano
The Quest	Cantata

1907

Sweetest Eyes were ever seen	Song
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[fol. 218]

1909

Wedding Morn	Song
--------------	------

1913

Marguerites	Song
Rain Song	Song
I Fear Thy Kisses, Gentle Maiden	Song

A very complete account of my husband's life and works is to be found in the book entitled "The Life of Ethelbert Nevin" by Vance Thompson, published and copyrighted by the Boston Music Company in 1913.

If the State Statute is enforced against me, I will lose the moneys that I receive from the Society, and will be without means of livelihood. I am 70 years of age, and I ask the protection of this Court of Equity to preserve me in my declining years against want and poverty, in memory of a man who has enriched this nation with his genius.

As evidence of the perennial appeal of my husband's works, "Mighty Lak' a Rose" was reported performed over the radio in 1935 over 6,000 times and "The Rosary" was reported performed over the radio that year over 3,000 times, including performances in the State of Florida. I have obtained these figures from the record furnished to me by the Society, which in turn is furnished to it by the two principal radio networks. It does not purport to represent all of the actual performances given by radio

broadcasters throughout the country. I have frequently heard many other songs of my husband's performed over the radio, but have found no report made of them by the broadcasters. These songs have all been and are now being performed with- the State of Florida.

Nevertheless, from these meagre reports it is apparent that the radio broadcasters are making a very substantial [fol. 219] use of my husband's songs. Hotels, motion picture theatres, cabarets and dance halls make no record, so far as I know, of public performances of musical compositions, including my husband's, so that it is impossible to estimate the extent of such use. Alone and unaided, it would be impossible for me to license the public performance for profit of my husband's compositions. I have no financial resources for that purpose; I could not engage lawyers or investigators throughout the country, and I would be utterly helpless.

It is for that reason that I joined the Society, knowing that in the combined strength of those similarly situated, we could protect the public performance for profit of our works against piracy and infringement.

If the State Statute should be enforced, it would make it impossible for the Society to operate in that State, and I, and others similarly situated, would be in the same position that my husband was in at the time of his death.

The practical effect of the State Statute is to give to selfish and powerful groups the right to exploit, without compensation, my husband's works and the works of other authors and composers.

The Copyright Statute carefully provided that the widow of an author was to have the first right to renew the original term of copyright. It was the public policy of the Government of the United States, realizing that authors pay much more attention to the creation of their works than to the business of obtaining money therefrom, to protect the widows and families of authors by that provision of the Copyright Act. That beneficent provision and public policy of the Government would be utterly destroyed by the State Statute.

[fol. 220] As the initial terms of the respective copyrights in the works of my late husband expire, the renewal rights vest in me, and I have exercised such rights with respect to certain compositions and am continuing and will continue



to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works for limited periods or for the balance of the term of copyright.

Under the State Statute, this right is denied to me. I must grant to my publisher, not only the right of publication, but all other rights under the copyright, since he is given the sole power to fix the value and price of all uses including the public performances for profit of my copyrighted works in the State of Florida.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will seriously impair the value of my existing rights in copyrights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Anne Paul Nevin.

Sworn to before me this 21st day of January, 1938.  
Marion L. Elkin, Notary Public, New York County,  
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx  
Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk.  
No. 22, Reg. No. 9090. Commission expires March  
30, 1939.

[fol. 221] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### AFFIDAVIT OF DEEMS TAYLOR

Deems Taylor, being duly sworn, deposes and says:

I am a composer and one of the complainants herein.

[fol. 222] I reside at Stamford, Connecticut.

I was formerly a music critic with the New York World, and have for several years past devoted myself almost exclusively to the composition of serious music.

In 1913 I wrote "The Siren Song", a symphonic poem which received a prize from the National Federation of Musical Clubs. And in addition to "Through the Looking

Glass" (a suite from Lewis Carroll's 'Alice In Wonderland', mentioned in the complaint). I also composed such choral works as "The Chambered Nautilus" and "The Highwayman" and a song cycle entitled "The City of Joy"; I also composed "The Portrait of a Lady", a symphonic poem "Jurgen" and a suite "Circus Day". I composed two grand operas "The King's Henchman" and "Peter Ibbetson", both of which were produced in the City of New York at the Metropolitan Opera House.

I also do a great deal of work upon the radio as a commentator, particularly in conjunction with the Philharmonic Symphony Orchestra.

A reference to my life and works is to be found in The New Encyclopedia of Music and Musicians by Waldo Selden Pratt (the MacMillan Company, 1935), and in An Outline of the History of Music by Karl Nef (Columbia University Press, 1935).

I am composing musical works at the present time and hope to continue to do so for the balance of my life.

My livelihood depends upon my ability as a composer, critic, reviewer and commentator and upon the demand for my works with the public.

[fol. 223] In the year 1930, I became a member of the American Society of Composers, Authors and Publishers, and for each of the past four years, I have received annually in excess of \$3,000 from said Society for the right which I gave to it to license users of music to publicly perform for profit my musical works and expect to receive a sum in excess of \$4,000 annually for the balance of my contract with the Society and future contracts with it; the value of my contract with the Society is in excess of \$15,000.

The amount that I receive from the Society is a very substantial part of my annual income. If I were required to issue individual licenses for the public performance of my works for profit throughout the United States, it would require engaging a large corps of employees, a large corps of investigators and accountants, lawyers and experts who would be qualified to determine the value of a particular use of a particular one of my musical compositions in a particular establishment. Considering that there are 30,000 establishments throughout the country, any one of which might perform all or part of my works without notice to me, the burden imposed would compel me to completely forego the revenue that I receive at present from the public perform-

ance of my compositions, since it would cost me more than \$5,000 to comply with the laws of the State of Florida, where there are more than 390 users of copyrighted musical works.

My annual income by way of royalties from the publishers of my musical compositions has averaged for the past ten years in excess of \$500.00. I have received mechanical royalties for the use of my works in conjunction with phonograph records, piano player rolls at an average sum each in [fol. 224] excess of \$100 for the same period.

It has been my experience, as well as the experience of other composers in the country, that all users of music would pay the composer nothing for the public performance for profit of his music unless he were in a position to enforce his rights. Singly and individually, I have never been in such a position and can never be in such a position, nor can any other writer or composer in the United States be in such a position. It has been necessary to join the Society in order to prevent unlimited piracy of our works and in order that we may earn our livelihood and be repaid for the product of our brain and creative faculties.

The Statute attempts to place me and other composers and writers, as well as publishers, in the same position that we were all in prior to the formation of the Society in 1914, when composers, authors and publishers in this country received nothing from the public performance for profit of their musical compositions. This is accomplished in an indirect manner under the Statute, by penalizing me and others similarly situated if we join together to prevent piracy and to protect our interests. This is sought to be accomplished by imposing conditions which cannot reasonably be met, and the penalties for our non-compliance are quite drastic. As a matter of fact, I cannot meet the demands of the State Statute because I am now a member of the Society, and since I have a valid, subsisting and binding contract with the Society, which is good until December 31, 1940, I cannot breach it.

[fol. 225] The fixing of prices for my compositions would violate my contract with the Society because that contract is a relinquishment by me of all rights whatsoever for the limited period of the contract, with respect to the licensing of the public performance for profit of my musical compositions.

When I composed my musical compositions and secured copyright thereon, or permitted a publisher, in some instances, to secure copyright thereon (reserving other rights to myself), I did so with the knowledge that I would be given certain exclusive rights with respect to my works for a limited period and that the rights flowing from the purchase or sale of the material object copyrighted were separate and distinct from rights under the copyright itself and that after the expiration of that period as fixed by Statute, all of my works would fall in the great reservoir of the public domain to be enjoyed free by the public thenceforth. That to my way of thinking was the purpose and spirit of the Copyright Act.

Encouraged by that Act, I have composed my works in the hope and expectation that I can during my lifetime obtain sufficient remuneration from my labors to support myself and my dependents. The State Statute deliberately flouts this purpose and destroys my expectations, because it at once seeks to place the public performance for profit of my musical compositions in the hands of all users in the State of Florida who may use them at will and pay me a sum to be fixed in advance, which sum cannot adequately be measured in proportion to the true value of my compositions.

[fol. 226] The State Statute was not enacted in the public interest. The Copyright Act itself has taken care of the true public interest, and it has provided in Section 28 that all performances of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, may be given free of any royalties, provided the performance is given for charitable or educational purposes and not for profit.

The selfish group of radio broadcasters and motion picture theatre owners operating in the States of Nebraska, Montana, Washington, Florida and Tennessee, who have sponsored this iniquitous bill, do not come within this section of the Copyright Act. Theirs is not a public interest but a selfish, private interest. They wish to enjoy the fruits of my labors for a pittance and deprive me of the ability to maintain myself for the purpose of creating music. They



are not acting in the public interest, and the State Statute was not created in the public interest.

To demonstrate how absurd it is to even attempt to fix a price for all uses of any of my musical compositions and those of others similarly situated, the Copyright Statute itself, recognizing that there is no way of proving the damage for the violation by pirates of musical compositions, fixes a minimum damage of \$250 for the piracy of such compositions. Congress in enacting this Statute, as I have been informed by eminent counsel, realized that such substantial damages are necessary in order to deter users from [fol. 227] wilfully infringing such works. The only purpose of compelling an author to fix a price for all uses of his composition can be to evade the provision for minimum statutory damages and to grant an involuntary license so that the copyright owner who detects a particular infringement of his work can recover only a nominal sum, which would hardly compensate for the cost of investigating the infringement, let alone the counsel fees and other expenses necessarily involved.

As the initial terms of the respective copyrights in my works expire, the renewal rights vest in me, and I have exercised such rights with respect to certain compositions and am continuing and will continue to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works for limited periods or for the balance of the term of copyright.

Under the State Statute, this right is denied to me. I must grant to my publisher, not only the right of publication, but all other rights under the copyright, since he is given the sole power to fix the value and price of all uses of my copyrighted works in the State of Florida.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will seriously impair the value of my existing rights in copy-[fol. 228] rights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Deems Taylor.

Sworn to before me this 21st day of January, 1938.  
 Marion L. Elkin, Notary Public, New York County.  
 N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx  
 Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk.  
 No. 22, Reg. No. 9090. Commission expires March  
 30, 1939.

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[fol. 229] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ELLA HERBERT BARTLETT

[fol. 230] UNITED STATES OF AMERICA,  
 Southern District of New York,  
 State and County of New York, ss:

Ella Herbert Bartlett, being duly sworn, deposes and says:

I am one of the complainants herein, and the daughter of the late Victor Herbert, who has been referred to by music critics and by the public generally, as the leading and most gifted composer of music this country has ever had.

My late father devoted his life to music and to the musical profession. He went through many struggles and hardships in his younger days, and when success smiled upon him, he tried to help the writers and composers of America.

With the growth of the amusement and entertainment field, early in the twentieth century, my father realized that something would have to be done to obtain for these writers and composers adequate recompense for their labors and genius. He saw entertainment developing along the lines of pretentious cabarets, night-clubs and supper-clubs. He saw the restaurants presenting elaborate forms of musical entertainment, in addition to food. Yet, from none of these sources did a single penny come to the writer or composer.

My father was aroused by this injustice, and, in conjunction with other celebrated musicians, writers, composers and publishers of his day, he helped to organize the American Society of Composers, Authors and Publishers for the protection of the performing rights of those who created and published the music of the Nation. The test suit which won legal recognition of the rights of authors and composers was brought in my father's name—Victor Herbert vs. Shanley Co., 242 U. S. 591.

[fol. 231] Although my father served as a director and an officer of the American Society, he never asked for or received any compensation.

After his death in 1924, I was admitted to membership in the American Society, and have been a member continuously since said time. I have participated in the royalties derived annually by the Society from performances of works composed by my father, and I have received, since 1924, varying amounts, averaging in excess of \$4,000.00 per year. In the year 1936, I received by way of royalties a sum in excess of \$9,000. I shall receive at least an equal amount from the Society this current year, unless the State Statute is enforced, in which event I shall suffer loss of this revenue. Were it not for the American Society, I would not receive any compensation for the public performance for profit of the individual numbers composed by my father.

My father was a very prolific composer. It would be almost impossible to set down here a complete list of his works. He wrote a great many operettas, light operas and musical comedies, the principal ones being:

M'lle. Modiste  
Naughty Marietta  
The Century Girl  
Old Dutch  
The Cinderella Man  
Prince Ananias  
The Wizard of the Nile  
Serenade  
Idol's Eye  
Cyrano de Bergerac  
The Ameer  
Singing Girl  
Viceroy  
Dolly Dollars  
Babette  
Tattooed Man  
Wonderland  
It Happened in Nord-  
land  
Song Birds  
Camille  
Prima Donna

Red Mill  
Sweet Sixteen  
Duchess  
Only Girl  
Princess Pat  
Enchantress  
Lady of the Slipper  
Velvet Lady  
Eileen  
The Debutante  
The Madcap Duchess  
Madeleine  
Natoma  
Sweethearts  
My Golden Girl  
Girl in the Spotlight  
Orange Blossoms  
Dream Girl  
Angel Face  
Her Regiment  
Oui Madame

[fol. 232] From time to time, various publishers acquired the publication rights to my father's works; the two principal firms that published his music were M. Witmark & Sons and G. Schirmer, Inc.

In most instances my father reserved to himself all performing rights, both dramatic and non-dramatic, in his works, as appears from typical contracts which are annexed hereto as Schedules VI and VII.

In addition to the dramatico-musical works enumerated above, my father composed a great number of musical compositions, some of which achieved tremendous popularity. There were waltzes, symphonic poems, suites, lieder and other pieces. I need mention only a few:

The Whiteman Suite  
Suite Romantique  
Suite Columbus  
Fleurette  
Souvenir  
Sunset  
Devotion  
Dream On (Indian  
Melody)  
McKinley March  
22nd Regiment March  
Irish Rhapsody  
Al Fresco  
Heart Throbs  
The Belle of Pittsburgh

Badinage  
Indian Summer  
Pan Americana  
Habanera  
Yesterthoughts  
American Fantasia  
Valse a la Mode  
American Rose Waltz  
Christ is Risen  
Air de Ballet  
Woodland Fancies  
Punchinello  
Star Light Waltz  
Forebodings

These compositions are played wherever music is sung or played in the United States, and famous popular songs from my father's dramatico-musical works, as well as other, separate compositions have been played in the State of Florida for a great many years. They are part of the musical culture of that State, and wherever concerts are given, and whenever, during a great many years last past, an important hour has been broadcast over the radio in the State of Florida, my father's works have been included.

My father rarely granted to a publisher of his works all the rights in a particular copyrighted musical composition. [fol. 233] As a rule, he reserved to himself the performing rights, both dramatic and non-dramatic. The



publisher merely has the right to make and sell copies of the respective musical works composed by my father.

Under the Florida Statute, the publisher of sheets of music and the manufacturer of phonograph records and music rolls would not only have the right, but the duty, to fix the price and to collect for the public performance for profit, as well as for all other uses of these copyrighted works. This would be an impairment of the obligation of these contracts and an invasion of my rights under these copyrights, and it would seriously interfere with, and reduce the compensation which I have been receiving from licensing and disposing of other rights in the copyrighted works, such as the non-dramatic, dramatic performing rights, motion picture rights, the right to make arrangements and adaptations, to make other versions of the works, to make records and music rolls as well as to license, separately, the other forms of uses recognized by and granted under the Copyright Law of the United States.

There is a well known distinction between non-dramatic and dramatic performances of copyrighted works. Each of the operettas written by my father is composed of a number of individual musical compositions.

My contract with the Society is an exclusive license to give non-dramatic public performances for profit of these separate musical compositions, and the Society, in turn, licenses users to give such performances. The rights granted to the Society, and in turn licensed by it, are known as the "small performing rights". The right to perform an entire operetta, or to give a dramatic performance of a combination of any of the songs constituting such operetta [fol. 234] is known as a "grand right", and this right is not granted to or licensed by the Society.

Under the Florida Statute, a user in that State could buy copies of the separate musical compositions or phonograph records thereof constituting an operetta, and upon payment of the price fixed for each such sheet of music or record the user could give a performance of the entire operetta without compensating me for such a performance, which would be the performance of a dramatico-musical composition.

The Copyright Law protects me against such performances which are made in public, whether they are for profit or not.

In this respect, this valuable right of performance of a dramatico-musical work differs from the limited right of

performance of separate musical compositions, which rights are only protected when the performance is both public and for profit.

Many rights and the many contracts which are involved in a particular copyrighted composition, and which would make it impossible for either myself or my publishers to fix a particular price for a particular use of such composition, are exemplified as follows:

I have taken a few of my father's works, such as "The Red Mill", "Naughty Marietta", "M'lle Modiste" and "Babes in Toyland", and here is what I find:

On "The Red Mill", there are 46 copyrights and 11 arrangements. I have also taken out 28 renewals of copyright on the various numbers of "The Red Mill". Annexed hereto and made part hereof, is a list of the copyrights of the various numbers, arrangements and renewals, marked Schedule "I".

[fol. 235] On "Naughty Marietta", there are 58 copyrights, and annexed hereto, made part hereof and marked Schedule "II", is a list of the respective copyrights covering that work.

On "M'lle Modiste", the publisher, M. Witmark & Sons, has enumerated 53 original copyrights and 25 renewals, making a total of 78 copyrights, as appears by a list annexed hereto and made part hereof, marked Schedule "III".

On "The Red Mill", my records number 44 original copyrights and 28 renewals, or a total of 72 copyrights, as appears by a schedule hereto annexed, marked Schedule "IV".

On "Babes in Toyland", my records indicate 32 original copyrights and 31 renewals, or a total of 63 copyrights; all as appears by a list annexed hereto and marked Schedule "V".

However, my records and the records of the publishers, on the works above mentioned, do not seem to tally, and we have never been able to come to entire agreement with respect to all of the copyrighted works composed by my father. In some cases, the publishers seem to have copyrights for works of which I have no record, and in other cases, I have copyrights of works of which they seem to have no record.

In "M'lle Modiste", there was a lengthy song entitled, "If I Were On the Stage". Mme. Fritzi Scheff appeared

in the original version of the production. At the very end of that song, there was a finale number which proved to be tremendously popular. The audiences liked it so much that the publishers decided to bring it out as a separate number; this was done; and this finale part of the song of "M'lle Modiste" was published as the song, "Kiss Me Again". To this day, it continues to be very popular. My publisher's list indicates ten separate copyrights on "Kiss [fol. 236] Me Again", in addition to the number "If I Were on the Stage"; as appears by Schedule "III" hereto annexed, most of these are arrangements. With respect to each of these, various licenses have been granted, uses made, and rights conveyed, not only in the United States, but in Great Britain, Germany, France, Italy, Spain and other countries throughout the world.

The operetta, "M'lle Modiste", (like most of my father's operettas) has been published as an entire operetta in the form of a complete score.

For a great many years manufacturers have made and are still making records and music rolls of substantially all of my father's musical compositions; no payment therefor has ever been made to my father or me except the two cents for each record or roll required by Section 1 E of the Copyright Act. Neither my father nor I have ever given to such manufacturers a license authorizing them to give purchasers of such records or rolls the right to use the same for public performances for profit; the Copyright Act expressly denies such right to the manufacturers and the purchasers of the records and rolls. The State Statute however, in direct conflict with the Copyright Act, confers that right upon manufacturers and purchasers. I have no means of preventing such manufacturers from making records and rolls in the future, and from sending them to and selling them in the States of Nebraska or Florida.

Under the Florida Law, anyone buying a score of that operetta, would have a right to perform the entire operetta publicly in an auditorium before thousands of people, for an indefinite period of time, without paying any additional compensation to me whatsoever.

[fol. 237] A motion picture company, operating in the State of Florida, could incorporate the entire operetta in a motion picture, without granting any additional compensation to me.

It cannot be that the will of Congress which has protected me in these exclusive rights may be set aside by the State of Florida.

As shown by the annexed schedules, there have been a great many renewals of copyright taken out either by me or by my brother and me. (My brother, Clifford V. Herbert, and I were the only children and my mother is dead.) These renewals are of great value to me.

If I were required to ascertain whether performances in Florida were from sheets of music purchased in that State or to attempt to fix a price for all uses it would involve engaging a corps of employees, a large corps of investigators and accountants, lawyers and experts who would be qualified to determine the value of a particular use of a particular composition in a particular establishment.

Considering that there are 30,000 establishments throughout the country, anyone of which might perform all or part of my father's works every night of the week, it would be a terrific burden for me to keep track of the performances. It is only by reason of my membership in the American Society of Composers, Authors and Publishers that I am able to obtain compensation for the public performance for profit of my father's works.

The renewals of copyright taken out by me are, in my opinion, worth in excess of \$100,000.00. My right to renew the copyrights of my father's works, as the original copy-[fol. 238] rights expire, from time to time, is worth in excess of \$100,000.00. If the State Statute were to be enforced, the value of the aforementioned renewal rights to me would be totally destroyed.

As the initial terms of the respective copyrights in the works of my late father expire, the renewal rights vest in me, in some cases alone, and in some cases jointly with my brother Clifford Herbert. I have exercised such rights with respect to certain compositions and am continuing and will continue to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works, for limited periods or for the balance of the term of copyright nor am I compelled to grant to



manufacturers of records and rolls any right except the limited right to manufacture.

Under the State Statute, I must grant to my publisher and to the manufacturers of records and rolls not only the right of publication and manufacture respectively but all other rights under the copyright, since they are given the sole power to fix the value and price of public performances for profit and other uses of my copyrighted works in the State of Florida.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will [fol. 239] seriously impair the value of my existing rights in copyrights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Ella Herbert Bartlett.

Sworn to before me this 21st day of January, 1938.  
Marion L. Elkin, Notary Public, New York County.  
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.  
Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.  
22, Reg. No. 9090. Commission expires March 30,  
1939.

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Schedule I

240

ACKNOWLEDGEMENTS FROM THE COPYRIGHT OFFICE OF THE RECEIPT OF  
TWO COPIES OF THE FOLLOWING COMPOSITIONS FROM "THE RED MILL"

- 1        DRAMATIC COMPOSITION  
      (BECAUSE YOU'RE YOU  
      ( " " " Arr. for Trombone Solo  
      ( " " " " " Cornet Solo  
7 (6) ( " " " " " Mandolin Orch.  
      ( " " " " " Guitar Solo  
      ( " " " " " Hotel Orch.  
8        ENTRANCE (GOVERNOR AND CHORUS)  
9        EVERY DAY IS LADIES DAY WITH ME  
10       GOOD-A-BYE JOHN  
11       GO WHILE THE GOIN' IS GOOD  
12       THE RED MILL FANTASIA  
13       FINALE 11  
15 (2) (IF YOU LOVE BUT ME  
      ( " " " " " Arr. for Orchestra  
16       I'LL RING THE BELL  
17       I'M ALWAYS DOING SOMETHING I DON'T WANT TO DO  
      (IN THE ISLE OF OUR DREAMS  
21 (4) ( " " " " " " Arr. for Hotel Orch.  
      ( " " " " " " " " Cornet Solo  
      ( " " " " " " " " Trombone Solo  
23 (2) (THE LEGEND OF THE MILL  
      ( " " " " " " Arr. for Hotel Orch.  
25 (2) (MIGNONETTE  
      ( " " " " " " Arr. for Hotel Orch.  
26       MOONBEAMS  
27       OPENING CHORUS ACT 1  
29 (2) (THE STREETS OF NEW YORK  
      ( " " " " " " Arr. for Hotel Orch.  
30       WHEN YOU'RE PRETTY THE WORLD IS FAIR  
32 (2) (WHISTLE IT  
      ( " " " " " " Arr. for Hotel Orch.  
33       A WIDOW HAS WAYS  
34       YOU NEVER CAN TELL ABOUT A WOMAN  
35       THE RED MILL VOCAL SCORE  
37 (2) (LANCERS  
      ( " " " " " " Arr. for Band  
39 (2) (MARCH AND TWO STEP Arr. for Band  
      ( " " " " " " " " Orchestra  
40       SCHOTTISCHE Arr. for Orchestra  
43 (3) (SELECTION  
      ( " " " " " " Arr. for Orchestra  
      ( " " " " " " " " Band  
46 (3) (WALTZES  
      ( " " " " " " Arr. for Mandolin Orch.  
      ( " " " " " " " " Orchestra

CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING  
ARRANGEMENTS OF "MOONBEAMS" From "THE RED MILL"

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- 11 Arrangements MIXED VOICES  
VOCAL ORCHESTRA  
MALE VOICES  
DUET IN D  
FEMALE VOICES  
TWO PART SONG  
THREE PART SONG  
S.A.B.  
CELLO AND PIANO  
VIOLIN CELLO AND PIANO  
VIOLIN AND PIANO

RENEWAL CERTIFICATES COVERING THE FOLLOWING COMPOSITIONS  
FROM "THE RED MILL"

- 1 DRAMATIC COMPOSITION  
2 BECAUSE YOU'RE YOU  
3 ACT 1 OPENING CHORUS  
4 " 2 " "  
5 ENSEMBLE  
6 ENTRANCE SONG AND CHORUS  
7 EVERYDAY IS LADIES DAY WITH ME  
8 GOOD A BYE JOHN  
9 GO WHILE THE GOING IS GOOD  
10 FINALE 1  
11 " 2  
12 IF YOU LOVE BUT ME  
13 I'LL RING THE BELL  
14 Renewals IN THE ISLE OF OUR DREAMS  
15 I'M ALWAYS DOING SOMETHING I DON'T WANT TO DO  
16 LANCERS  
17 THE LEGEND OF THE MILL  
18 MIGNONETTE  
19 MOONBEAMS  
20 OVERTURE  
21 SELECTION  
22 THE STREETS OF NEW YORK  
23 TEACH THEM WHAT TO SAY  
24 WHISTLE IT  
25 VOCAL SCORE  
26 WHEN YOU'RE PRETTY AND THE WORLD IS FAIR  
27 A WIDOW HAS WAYS  
28 YOU NEVER CAN TELL ABOUT A WOMAN

- 11 Arrangements on Moonbeams  
28 Renewals  
46 Copyrights (originals)  
85 Separate copyrights and renewals

CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING NUMBERS  
FROM "NAUGHTY MARIETTA"

1		DRAMATIC COMPOSITION	
		(AH SWEET MYSTERY OF LIFE	
		" " " " " " Arr. for Violin, Cello & Piano	
		" " " " " " " " Dance Orch.	
		" " " " " " " " Piano	
		" " " " " " " " Violin & Piano	
		" " " " " " " " Duet In D	
		" " " " " " " " " " B Flat	
17	(16)	" " " " " " " " Three Part Song	
		" " " " " " " " Mixed Voices	
		" " " " " " " " Male Voices	
		" " " " " " " " Two Part Song	
		" " " " " " " " Male Voices	
		" " " " " " " " Vocal Orch.	
		" " " " " " " " Female Voices	
		" " " " " " " " S.A.B.	
		" " " " " " " " Cello & Piano	
18		ALL I CRAVE IS MORE OF LIFE	
19		BARN DANCE SCHOTTISCHE	
20		DANCE OF THE MARIONETTES	
		(THE DREAM MELODY	
23	(3)	(THE DREAM MELODY Arr. for Orchestra	
		(THE DREAM MELODY " " Band	
24		IF I WERE ANYBODY ELSE BUT ME	
		(I'M FALLING IN LOVE WITH SOMEONE	
28	(4)	" " " " " " " " Arr. for Mixed Voices	
		" " " " " " " " " " Hotel Orch.	
		" " " " " " " " " " Mandolin Orch.	
		(ITALIAN STREET SONG	
		" " " " " " " " Arr. for Hotel Orch.	
		" " " " " " " " " " Duet in F	
		" " " " " " " " " " Soprano Solo	
37	(9)	" " " " " " " " " " Mixed Chorus	
		" " " " " " " " " " Three Pt. Song	
		" " " " " " " " " " S.A.B.	
		" " " " " " " " " " Two Pt. Song	
		" " " " " " " " " " Voc. Orch.	
38		IT NEVER NEVER CAN BE LOVE	
40	(2)	(IT'S PRETTY SOFT FOR SIMON	
		" " " " " " " " " " Hotel Orch.	
41		LANCERS	
42		LIVE FOR TODAY	
43		MISTER VOODOO	
45	(2)	(NAUGHTY MARIETTA	
		" " " " " " " " " " Hotel Orch.	
46		NEATH THE SOUTHERN MOON	
47		NEW ORLEANS JEUNESSE	
		(SELECTION	
51	(4)	" " " " " " " " " " Mandolin Orch.	
		" " " " " " " " " " Band	
		" " " " " " " " " " Orchestra	
52		THE SWEET BY AND BY	
54	(2)	(TRAMP TRAMP TRAMP	
		" " " " " " " " " " T.T.B.E.	



CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING NUMBERS  
FROM "NAUGHTY MARIETTA"

243

- 56 (2) (WALTZES  
( " Arr. for Orchestra  
57 WE'VE HUNTED THE WOLF IN THE FOREST  
58 YOU MARRY A MARIONETTE
- 

58 Copyrights

M'LE. MODISTE

Music - Victor Herbert

Book - Henry Blossom, Jr.

Partial List of Original Copyrights - in name of:  
 (M. Witmark & Sons, New York, as trustees for Victor Herbert  
 and  
 (Henry Blossom, Jr.

- 1 Book — Copyrighted October 6, 1905 - Entry D 7367  
 2 Vocal Score — Copyrighted October 30, 1905 - Entry C 105903

Individual Numbers

"If I Were on the Stage" (Note: original title of "Kiss Me Again")

- 3 Song:- Copyrighted October 13, 1905 - Entry C 104750  
 4 Arrangement for Hotel Orchestra - Copyrighted November 3, 1905,  
 Entry C 106471  
 5 Arrangement for Mandolin Orchestra by T. P. & Geo. J. Trinkaus  
 Copyrighted December 21, 1906 - Entry C 137558

6 "In Dreams So Fair"

Song:- Copyrighted January 25, 1906 - Entry C 112826

"Kiss Me Again" (part of "If I were on the Stage")

- 7 Copyrighted: April 16, 1915 - Entry E 358936 - song  
 8 June 7, 1915 - Entry E 364261 - Vocal Orch. Arrg.  
 9 April 20, 1916 - Entry E 388379  
 10 Oct. 18, 1916 - Entry E 398837  
 11 April 12, 1918 - Entry E 424236 - Band Arrangement  
 12 May 10, 1918 - Entry E 427376 - Arrg. by Otto Langey  
 13 August 20, 1921 - Entry E 533584  
 14 August 11, 1928 - Entry E 699618 -  
 15 Dec. 7, 1931 - Entry E 523779 - Arrg. for violin  
 16 E 523781 - and piano

"I Want What I Want When I Want It"

- 17 Copyrighted:- October 4, 1905 - Entry C 104028  
 18 January 20, 1906 - Entry C 112488  
 19 May 5, 1906 - Entry C 120630

"Chorus of Footmen"

- 20 Song Copyrighted October 13, 1905 - Entry C 104751  
 21 Piano Arrangement Copyrighted October 13, 1905 - Entry C 104752

"Dear Little Girl Who is Good"

- 22 Copyrighted September 29, 1905 - Entry C 103563

23 Copyright September 29, 1905 - Entry C 103564

"I'm Always Misunderstood"

24 Copyright October 7, 1905 - Entry C 104282

"I Should Think You Could Guess"

25 Copyright October 7, 1905 - Entry C 104283

"Mascot of the Troop"

26 Song - Copyright October 7, 1905 - Entry C 104281  
27 March - Copyright July 2, 1906 - Entry C 134697  
28 Two Step for Piano - Arrg. by Karl L. Hoschner  
Copyright January 20, 1906 - Entry C 112489  
29 Arrg. for Hotel Orchestra  
Copyright October 27, 1905 - Entry C 105784  
30 March & Two Step Arrg. for Orchestra  
Copyright February 21, 1906 - Entry C 114739

"Keokuk Culture Club"

31 Song - Copyright, October 16, 1905 - Entry C 105025

"The Time, The Place, and The Girl"

32 Song - Copyright October 12, 1905 - Entry C 104690  
33 Arrg. for Hotel Orch.  
Copyright November 3, 1905 - Entry C 106470  
34 Arrg. by Trinkaus for Mandolin Orch.  
Copyright February 9, 1906 - Entry C 113860

"The Nightingale and The Star"

35 Copyright October 14, 1905 - Entry C 104803

"When The Cat's Away the Mice Will Play"

36 Song - Copyright October 16, 1905 - Entry C 105026  
37 Arrg. by George Trinkaus for Mandolin Orch.  
Copyright December 20, 1924 - Entry C 606021

"Ze English Language"

38 Song - Copyright October 12, 1905 - Entry C 104691

"Love Me, Love My Dog"

39 Song - Copyright September 25, 1905 - Entry C 103305

Opening Chorus - Act I

40 Copyright October 23, 1905 - Entry C 105504

Finale Act I

246

41 Copyright November 3, 1905 - Entry C 106468

Opening Chorus - Act II

42 Copyright October 20, 1905 - Entry C 105311

Entr Acte

43 Piano - Copyright December 29, 1905 - Entry C 105023

44 Arrg. for Orch. by H. L. Rogers - Copyright January 29, 1906  
Entry C 113103

Ballet

45 Piano - Copyright October 16, 1905 - Entry C 105023

Selections

46 Piano Arrg. Copyright October 30, 1905 - Entry C 105902

47 Orch. arrg. by Otto Langey Copyright January 15, 1906  
Entry C 112206

Miscellaneous

48 Fantasia Arrangement by Tom Clark for piano and trombone  
Copyright August 24, 1907 - Entry C 160407

49 ditto for piano and coronet  
Copyright August 24, 1907 - Entry C 160408

50 Waltz Arrangement for Orchestra by Otto Langey  
Copyright March 3, 1906 - Entry C 115495

51 ditto for piano by Karl J. Hoschner  
Copyright February 21, 1906, Entry C 114732

52 March and Two Step  
Arrangement for Orchestra by Otto Langey  
Copyright February 21, 1906 - Entry C 114738

53 Lancers Arrangement for Orchestra by Otto Langey  
Copyright January 29, 1906 - Entry C 113104

- 1 Book - Renewed in name of Marjorie Wilson, widow of author;  
November 5, 1932 - Entry R 22194 (7367)

Following Renewed in name of Ella Herbert Bartlett, Clifford Herbert,  
and Marjorie Wilson:

Vocal Score

- 2 December 2, 1932 - Entry R 22367 (105903)

"If I Were on The Stage" ("Kiss Me Again")

- 3 Song December 2, 1932 - Entry R 22366 (104750)  
4 Hotel Orch. Arrg. December 10, 1932 - Entry R 22495 (106471)

"I Want What I Want When I Want It"

- 5 November 5, 1932 - Entry R 22026 (104028)

"Chorus of Footmen"

- 6 Song December 2, 1932 - Entry R 22368 (104751)  
7 Piano Arrg. December 2, 1932 - Entry R 22369 (104752)

"Dear Little Girl Who is Good"

- 8 November 5, 1932 - Entry 22024 (103563)

"Hats Make the Woman"

- 9 November 5, 1932, - Entry R 22025 (103564)

"I'm Always Misunderstood"

- 10 November 5, 1932 - Entry R 22022 (104282)

"I Should Think that you Could Guess"

- 11 November 5, 1932 - Entry R 22023 (104283)

"Mascot of the Troop"

- 12 Song - November 5, 1932 - Entry R 22021 (104281)

"Keokuk Culture Club"

- 13 Song - December 2, 1932 - Entry R 22387 (105025)

"The Time, The Place and The Girl"

- 14 Song - December 2, 1932 - Entry R - 22363 (104690)  
15 Hotel Orch. Arr. December 10, 1932 - Entry R 22494 (106470)



"The Nightingale and The Star"

16 December 2, 1932 - Entry R 22375 (104803)

"When The Cat's Away"

17 December 2, 1932 - Entry R 22388 (105026)

"Ze English Language"

18 December 2, 1932 - Entry R 22364 (104691)

"Love Me Love My Dog"

19 October 5, 1932 - Entry R 21656 (103305)

Opening Chorus - Act I

20 December 2, 1932 - Entry R 22402 (105504)

Finale - Act I.

21 December 9, 1932, - Entry R 22493 (106468)

Opening Chorus - Act II.

22 December 2, 1932 - Entry R 22395 (105311)

Entr Act

23 Piano - January 3, 1933 - Entry R 33851 (111033)

Ballet

24 Piano - December 2, 1932 - Entry R 22386 (105023)

Selections

25 Piano - December 2, 1932 - Entry R 22413 (105902)

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Henry Blossom, Jr.  
Renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson.

		— ORIGINAL —		— RENEWALS —	
		Date	Entry No.	Date	Entry No.
1	Book	Aug. 27, 1906	D-8998	Jan. 29, 1934	R-29233 1
2	Vocal Score	Sept. 27, 1906	C-130652	Jan. 6, 1934	R-28441 2
<b>Individual Numbers</b>					
3	Overture—Piano Score	Sept. 24, 1906	C-130367	Jan. 6, 1934	R-28420 3
4	Opening Chorus—Act I	July 25, 1906	C-126164	Aug. 25, 1933	R-26740 4
5	Entrance Song and Chorus	Aug. 22, 1906	C-127973	Aug. 25, 1933	R-26766 5
6	Finale I	Aug. 6, 1906	C-126953	Aug. 25, 1933	R-26749 6
7	Opening Chorus—Act II	Aug. 6, 1906	C-126954	Aug. 25, 1933	R-26750 7
8	Ensemble	Aug. 10, 1906	C-127259	Aug. 25, 1933	R-26756 8
9	Finale II	Sept. 24, 1906	C-130368	Jan. 6, 1934	R-28425 9
10	Because You're You	Sept. 7, 1906	C-129045	Sept. 21, 1933	R-27086 10
11	Every Day Is Ladies Day	Sept. 7, 1906	C-129046	Sept. 21, 1933	R-27087 11
12	Good-a-bye, John	Sept. 24, 1906	C-130414	Jan. 6, 1934	R-28433 12
13	Go While the Going is Good	Aug. 22, 1906	C-127974	Aug. 25, 1933	R-26767 13
14	If You Love But Me	Mar. 30, 1907	C-147028	Apr. 3, 1934	R-30899 14
15	I'll Ring the Bell	Sept. 24, 1906	C-130415	Jan. 6, 1934	R-28434 15
16	I'm Always Doing Something	Aug. 22, 1906	C-127975	Aug. 25, 1933	R-26768 16
17	In the Isle of Our Dreams	Aug. 22, 1906	C-127977	Aug. 25, 1933	R-26770 17
18	Legend of the Mill	Aug. 6, 1906	C-126956	Aug. 25, 1933	R-26752 18
19	Mignonette	July 19, 1906	C-125813	Aug. 25, 1933	R-26734 19
20	Moonbeams	Oct. 6, 1906	C-131451	Jan. 6, 1934	R-28455 20
21	Streets of New York	Aug. 22, 1906	C-127976	Aug. 25, 1933	R-26769 21
22	Teach Them What To Say	Aug. 10, 1906	C-127258	Aug. 25, 1933	R-26755 22
23	When You're Pretty and the World is Fair	Jan. 24, 1907	C-140923	Jan. 29, 1934	R-29202 23
24	Whistle It	Aug. 6, 1906	C-126955	Aug. 25, 1933	R-26751 24
25	A Widow Has Ways	July 19, 1906	C-125812	Aug. 25, 1933	R-26733 25
26	You Never Can Tell About A Woman	July 19, 1906	C-125811	Aug. 25, 1933	R-26732 26
27	Because You're You—Arrg't for Guitar by T. P. & Geo. J. Trinkaus	Mar. 5, 1907	C-144656		
28	In The Isle of Our Dreams—Arrg't for Mandolin Orch. by Trinkaus	Feb. 2, 1907	C-142116		
29	Selections—Arrg'd for Military Band by Herbert L. Clarke	Mar. 4, 1907	C-144584		
30	March and Two Step—Arrg'd for Band by Herbert L. Clarke	Mar. 4, 1907	C-144585		
31	March and Two Step—Arranged for Orchestra by Otto Langey	Dec. 3, 1906	C-139003		
32	Waltzes—Arrg'd for Mandolin Orch. by Trinkaus	May 1, 1907	C-150181		
33	Schottische—Arrg'd for Orchestra by Otto Langey	Dec. 31, 1906	C-139002		

## RED MILL

		— ORIGINAL —		— RENEWALS —	
		Date	Entry No.	Date	Entry No.
34	Lancers—Arrg'd by Otto Langey Orchestra Parts only	Oct. 29, 1906	C-133348		
35	Because You're You—Arrg'd for Mandolin Orch. by Trinkaus	Dec. 13, 1906	C-136836		
36	Selections—Arrg'd for Orchestra by Otto Langey	Nov. 17, 1906	C-134786		
37	Waltzes—Arrg'd for Orchestra by Otto Langey	Dec. 7, 1906	C-136302		
38	If You Love But Me—Arrg'd for Orchestra by W. C. O'Hare	June 4, 1907	C-153642		
39	Fantasia—Arrg. for Piano and Trombone by Tom Clark	Aug. 24, 1907	C-16404		
40	Fantasia—Arrg. for Piano and Cornet by Tom Clark	Aug. 24, 1907	C-16405		
41	In the Isle of Our Dreams—Song with Guitar Accom. arr. by Trinkaus	Mar. 8, 1907	C-146181		
42	Selections—Arrg. for Mandolin Orch. by Trinkaus		C-146606		
43	Waltzes—Arrg. for Military Band by Herbert L. Clarke	Apr. 3, 1907	C-147325		
44	Lancers—Arrg. for Piano by Karl L. Hoschna	Jan. 23, 1908	C-172634	Apr. 11, 1935	R-37148 27
	Selections—Arrg. by Karl L. Hoschna			1934	R-28472 28

44 Original Copyrights  
28 Renewals  
72 Copyrights Total

## BABES IN TOYLAND

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Glen MacDonough.  
Renewals issued to Ella H. Bartlett, Clifford Herbert and Alan MacDonough.

		— ORIGINAL —		— RENEWALS —	
		Date	Entry No.	Date	Entry No.
1	Book	June 15, 1903	D-3587	June 26, 1930	9435 1
2	Vocal Score	Aug. 22, 1903	C-53514	Aug. 22, 1903	R-9900 2
Individual Numbers					
3	March of the Toys—Piano Score	June 25, 1903	C-50193	July 25, 1930	R-9794 3
4	Babes in Toyland Waltzes Arrg't for Piano by Karl Hoschna	Aug. 11, 1903	C-52908	Sept. 3, 1930	R-9990 4
5	Selections—Piano Arrg't by K. Hoschna	Aug. 13, 1903	C-53048	Sept. 3, 1930	R-9991 5
6	March and Two Step Arr. for Piano by Hilding Anderson	Aug. 27, 1903	C-53819	Sept. 3, 1930	R-10028 6
7	Toyland	May 14, 1903	C-47877	July 25, 1930	R-9793 7
8	Opening Act 3—Chorus	Sept. 23, 1903	C-55185	Sept. 24, 1930	R-10300 8
9	Opening Act 2— "	Aug. 13, 1903	C-53068	Sept. 3, 1930	R-9992 9
10	Barney O'Flynn	July 1, 1903	C-50620	July 25, 1930	R-9790 10
11	Beatrice Barefacts	May 28, 1904	C-71675	June 3, 1931	R-14757 11
12	Before and After	May 11, 1903	C-47607	July 25, 1930	R-9792 12
13	Birth of the Butterfly—Finale Act I	Aug. 19, 1903	C-53345	Sept. 3, 1930	R-10023 13
14	Country Dance	Aug. 13, 1903	C-53067	Sept. 3, 1930	R-10021 14
15	Contrary Mary	May 11, 1903	C-47608	Sept. 3, 1930	R-9989 15
16	Floretta	June 5, 1903	C-49100	July 25, 1930	R-9796 16
17	Go to Sleep, Slumber Deep	July 22, 1903	C-51815	July 22, 1930	R-9798 17
18	Gavotte (Eccentric Dance) Piano	Aug. 19, 1903	C-53344	Sept. 3, 1930	R-10024 18
19	He Won't Be Happy Till He Gets It (Words by Chas. N. Douglas)	Jan. 11, 1904	C-62674	Jan. 14, 1931	R-12327 19
20	I Can't Do That Sum	Oct. 31, 1903	C-57876	Nov. 1, 1930	R-11039 20
21	In the Toymakers Workshop	Oct. 7, 1903	C-56203	Nov. 19, 1930	R-11431 21
22	Jane	June 17, 1903	C-49789	July 25, 1930	R-9795 22
23	John Johnson	May 14, 1903	C-47876	Sept. 3, 1930	R-9988 23
24	Legend	Aug. 22, 1903	C-53511	Sept. 3, 1930	R-10027 24
25	Mignonette	Aug. 19, 1903	C-53342	Sept. 3, 1930	R-10022 25
26	Military Ball	July 1, 1903	C-50619	July 25, 1930	R-9791 26
27	The Moon Will Help You Out	July 8, 1903	C-51047	July 25, 1930	R-9799 27
28	Never Mind Bo Peep	Aug. 19, 1903	C-53343	Sept. 3, 1930	R-10025 28
29	Our Castle in Spain	Dec. 7, 1903	C-60317	Dec. 10, 1930	R-11786 29
30	Song of the Poet	Aug. 22, 1903	C-53509	Sept. 3, 1930	R-10026 30
31	With Downcast Eye Renewals	May 28, 1903	C-48664	July 25, 1930	R-9797 31
32	I Can't Do That Sum—Polka Two Step Arr. by Karl. Hoschna	June 11, 1904	C-72377		

32 Original Copyrights

31 Renewals

63 Copyrights Total



[fol. 252]

## SCHEDULE VI

Agreement, made and entered into this 8th day of June, 1910, by and between Victor Herbert, of the City of New York, party of the first part, and M. Witmark & Sons, a corporation organized under the laws of the State of New York, party of the second part,

Whereas, the party of the first part has undertaken to write the musical score of a musical play entitled

“Trentini”

(Title Subject to Change)

the book and lyrics of which are by Rida Johnson Young, to be produced under the management of  
and

Whereas, the party of the second part is desirous of acquiring the exclusive license to print, publish and sell said musical score and any part or parts thereof, and the libretto and lyrics thereof, and any arrangement or selection of the whole or any part thereof.

Now, Therefore, this Agreement Witnesseth:

I. This agreement is made in consideration of the sum of One Dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged and in consideration of the faithful performance by the party of the second part of the terms, covenants and conditions hereinafter contained; and this agreement is limited exclusively to matters in connection with the printing, publishing and selling copies of said score, libretto and lyrics and parts thereof.

II. The party of the first part hereby grants to the party of the second part the sole and exclusive license and privilege to print, publish and sell in all countries copies of the libretto and lyrics and piano and vocal score of said musical play, or any part or portion of the said libretto, lyrics [fol. 253] and score and copies of any arrangement or selection of the whole or any part of said libretto, lyrics and score during the term of the copyrights thereof and renewals of such copyrights.

III. The party of the second part in consideration of said license, agrees at its own cost and expense, to do all acts and take all proceedings necessary or convenient to the procurement of copyright or copyrights with renewals of the same



in said libretto, lyrics and score and each and every part thereof and in all selections and arrangements thereof, as well as to give copyright performances in England and wherever necessary to protect the performing rights therein, in all countries in which it is possible to secure copyright and said copyrights so secured shall remain and be for all time the sole and absolute property of the party of the first part and to be held by the party of the second part in trust for the party of the first part; and the party of the second part further agrees at its cost and expense, to take all necessary and proper steps for the purpose of protecting the said copyrights from infringement and otherwise. All copyright performances given as aforesaid shall be at the cost and expense of the party of the first part.

IV. That all arrangements and selections of said score and any part thereof shall be made under the supervision and direction of the party of the first part, at the cost and expense of the party of the second part and the party of the second part shall employ only such musician or musicians for this purpose as may be named by the party of the first part and that neither the said score nor any part thereof, nor any arrangement or selection of the whole or any part of said score shall be published by the party of the second part unless under the supervision of the party of the first [fol. 254] part. The party of the second part further agrees to print and publish in first class style, the said libretto, lyrics and piano and vocal score and separately such numbers, songs and pieces thereof and such arrangements and selections thereof as may be directed by the party of the first part. The party of the second part agrees to insert upon each copy published the copyright notice or notices required by law, including the notice "that all performing rights are reserved." The party of the second part further agrees that no advertising matter of any kind shall appear on or in connection with the said publication, except such as relates to the said libretto, lyrics or score or the parts thereof, or other compositions composed by the party of the first part.

V. The party of the second part hereby agrees to pay to the party of the first part the following royalties: Twelve (12c) cents for and upon each and every copy of the piano and vocal score of said musical and dramatic composition sold by the party of the second part; an amount equal to ten (10%) per cent of the retail-marked price thereof for and

upon each and every copy of any separate number or songs or any combination of two or more numbers or songs of said musical play when printed together with the words thereof: an amount equal to fifteen (15%) per cent of the retail marked price thereof upon each and every copy of any arrangement or selection of the whole or any part of the music of said musical play for piano or any solo instrument, and an amount equal to ten (10%) per cent of the retail marked price upon each and every copy sold of arrangements for band and orchestra. The party of the second part agrees that the retail marked price of the various publications hereinbefore set forth shall be those customary and prevalent among first class music houses.

[fol. 255] It is understood that no royalties are to be paid for single numbers designated as "new issues" but the total number of such "new issues" are not to exceed one thousand.

VI. That party of the second part agrees not to distribute, sell, offer or expose for sale any copy of the said libretto and lyrics, piano and vocal scores, or any part or portion of the said libretto, lyrics and scores or any arrangement or selection of the whole or any part thereof, without the signature of the party of the first part conspicuously stamped or impressed upon the title page thereof, either by the party of the first part personally or by his duly authorized agent, and the party of the second part agrees immediately after printing any such copy to submit the same to the party of the first part or his duly authorized agent for signature. The party of the first part agrees at all reasonable times, personally or through his duly authorized agent, to impress or stamp his signature on any such copy as frequently as the party of the second part may reasonably require.

VII. The party of the second part further agrees that it will make regular settlements under this contract promptly on or about the fifteenth day of June and December in each year during the existence of said copyrights and that at the time of such settlement and payment, it will deliver to the party of the first part a full, true and itemized statement showing in detail all sales made by the party of the second part of any publication hereinbefore set forth and the royalties due said party of the first part at the time of such settlement.

VIII. The said party of the second part agrees that it will keep or cause to be kept, books of account in which full and [fol. 256] complete entry shall be made of all said publications printed and sold by the party of the second part and its agents and the said books shall at all reasonable times be open to the inspection of the party of the first part or his agent duly appointed in writing; and the said party of the first part or his attorney, shall have the right to examine any and all books of account of the said party of the second part containing any items, memoranda or information relating to the printing and sale of said publications, and to inspect and count the number of copies on hand.

IX. This contract shall not under any circumstances be considered as licensing the party of the second part to present or perform the said libretto, lyrics and musical score or any part thereof or granting any rights therein, except the publication rights. It is understood that this license is personal to the party of the second part and is not assignable by it without the consent in writing of the party of the first part.

X. The term "score" as used herein shall include any additional musical numbers that may be written for said play at any time.

XI. It is expressly understood that no numbers written by any person other than the party of the first part shall be published as part of the said libretto, lyrics and musical score nor shall any such number be published with a title page like or similar to that of the musical score.

XII. It is mutually agreed that the rights hereby granted to the party of the second part by the party of the first part are dependent upon the faithful performances by it of all the covenants and conditions herein contained and the failure of the party of the second part to carry out or perform [fol. 257] any of the covenants and conditions contained in this contract shall render its rights hereunder voidable at the option of the party of the first part and upon the party of the first part giving notice to the party of the second part terminating this agreement, then all rights which the party of the second part may obtain by virtue of this contract shall cease and terminate, and shall at once revert to the party of the first part and shall belong to him as if this contract had never been made, without prejudice to any

rights that the party of the first part may have by reason of any breaches of this contract; and in such event, or in the event of the bankruptcy or insolvency of the party of the second part or its abandonment of the music publishing business, the party of the second part agrees to immediately assign to the party of the first part in proper form, any and all copyrights which the party of the second part may have secured by virtue of this contract and at the same time to return all manuscripts belonging to the said party of the first part.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of:

Victor Herbert (Seal) (L. S.), M. Witmark & Sons,  
by Isidore W. Witmark, Pres. (L. S.)

[fol. 258]

#### Schedule VII

Agreement, made and entered into this 2nd day of April, 1914, by and between Victor Herbert, of the City of New York, party of the first part, and M. Witmark & Sons, a corporation organized under the laws of the State of New York, party of the second part,

Whereas, the party of the first part has undertaken to write the musical score of a musical play entitled "*The Only Girl*" (Title subject to change)—the musical version of "*Our Wives*"), and

Whereas, the party of the second part is desirous of acquiring the exclusive license to print, publish and sell said musical score and any part or parts thereof, and the libretto and lyrics thereof, and any arrangement or selection of the whole or any part thereof,

Now, Therefore, this Agreement, Witnesseth:

First. This agreement is made in consideration of the sum of One Dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged and in consideration of the faithful performance by the party of the second part of the terms, covenants and conditions hereinafter contained; and this agreement is limited exclusively to matters in connection with the printing, publishing and

selling copies of said score, libretto and lyrics and parts thereof.

Second. The party of the first part hereby grants to the party of the second part the sole and exclusive license and privilege to print, publish and sell in all countries copies of the libretto and lyrics and piano and vocal score of said musical play, or any part or portion of the said libretto; lyrics and score and copies of any arrangement or selection of the whole or any part of said libretto, lyrics and score during the term of the copyrights thereof and renewals of such copyrights.

[fol. 259] Third. The party of the second part in consideration of said license, agrees at its own cost and expense, to do all acts and take all proceedings necessary or convenient to the procurement of copyright or copyrights with renewals of the same in said libretto, lyrics, and score and each and every part thereof and in all selections and arrangements thereof.

Fourth. That all arrangements and selections of said score and any part thereof shall be made under the supervision and direction of the party of the first part, at the cost and expense of the party of the second part and the party of the second part shall employ only such musician or musicians for this purpose as may be named by the party of the first part and that neither the said score nor any part thereof, nor any arrangement or selection of the whole or any part of said score shall be published by the party of the second part unless under the supervision of the party of the first part. The party of the second part further agrees to print and publish in first class style, the libretto, lyrics and piano and vocal score and separately such numbers, songs and pieces thereof and such arrangements and selections thereof as may be directed by the party of the first part. The party of the second part agrees to insert upon each copy published the copyright notice or notices required by law, including the notice "that all performing rights are reserved". The party of the second part further agrees that no advertising matter of any kind shall appear on or in connection with the said publication, except such as relates to the said libretto, lyrics or score or the parts thereof, or other compositions composed by the party of the first part.



Fifth. The party of the second part hereby agrees to pay to the party of the first part the following royalties: Twelve and one-half ( $12\frac{1}{2}\text{¢}$ ) cents for and upon each and every copy of the piano and vocal score of said musical and dramatic composition sold by the party of the second part; an amount equal to seven and one-half ( $7\frac{1}{2}\%$ ) per cent of the retail market price thereof for and upon each and every copy of any separate number or song or any combination of two or more numbers or songs of said musical play when printed together with the words thereof; an amount equal to seven and one-half ( $7\frac{1}{2}\%$ ) per cent of the retail marked price thereof upon each and every copy of any arrangement or selection of the whole or any part of the music of said musical play for piano or any solo instrument. The party of the second part agrees that the retail marked price of the various publications hereinbefore set forth shall be those customary and prevalent among first class music houses.

It is understood that no royalties are to be paid for single numbers designated as "new issues" but the total number of such "new issues" are not to exceed one thousand.

The party of the first part hereby assigns, transfers, sets over and conveys to the party of the second part all mechanical rights in the lyrics written and composed by him for the musical play above mentioned, and the said party of the second part hereby agrees to collect such royalties as may accrue to the party of the first part and will pay to the party of the first part one-half of his share of all moneys received by the said party of the second part.

Sixth. The party of the second part agrees not to distribute, sell, offer or expose for sale any copy of the said libretto and lyrics, piano and vocal score, or any part or portion of the said libretto, lyrics and scores or any arrangement or selection of the whole or any part thereof, without the signature of the party of the first part conspicuously stamped or impressed upon the title page thereof, either by the party of the first part personally or by his duly authorized agent, and the party of the second part agrees immediately after printing any such copy to submit the same to the party of the first part or his duly authorized agent for signature. The party of the first part agrees at all reasonable times, personally or through his duly authorized agent, to impress or stamp his signature on any

such copy as frequently as the party of the second part may reasonably require.

Seventh. The party of the second part further agrees that it will make regular settlements under this contract promptly on or about the fifteenth day of June and December in each year during the existence of said copyrights and that at the time of such settlement and payment, it will deliver to the party of the first part a full, true and itemized statement showing in detail all sales made by the party of the second part of any publication hereinbefore set forth and the royalties due said party of the first part at the time of such settlement.

Eighth. The said party of the second part agrees that it will keep or cause to be kept, books of account in which full and complete entry shall be made of all said publications printed and sold by the party of the second part and its agents and the said books shall at all reasonable times be open to the inspection of the party of the first part or his agent duly appointed in writing; and the said party of the first part or his attorney, shall have the right to examine any and all books of account of the said party of the second part containing any items, memoranda or information relating to the printing and sale of said publications, and to inspect and count the number of copies on hand.

Ninth. This contract shall not under any circumstances be considered as licensing the party of the second part to present or perform the said libretto, lyrics and musical score or any part thereof or granting any rights therein. [fol. 262] except the publication rights.

Tenth. The term "score" as used herein shall include any additional musical numbers that may be written for said play at any time.

Eleventh. It is expressly understood that no numbers written by any person other than the party of the first part shall be published as part of the said libretto, lyrics and musical score nor shall any such number be published with a title page like or similar to that of the musical score.

Twelfth. It is mutually agreed that the rights hereby granted to the party of the second part by the party of the first part are dependent upon the faithful performance by

it of all the covenants and conditions herein contained and the failure of the party of the second part or carry out or perform any of the covenants and conditions contained in this contract shall render its rights hereunder voidable at the option of the party of the first part and upon the party of the first part giving notice to the party of the second part terminating this agreement, then all rights which the party of the second part may obtain by virtue of this contract shall cease and terminate and shall at once revert to the party of the first part and shall belong to him as if this contract has never been made, without prejudice to any rights that the party of the first part may have by reason of any breaches of this contract; and in such event, or in the event of the bankruptcy or insolvency of the party of the second part or its abandonment of the music publishing business, the party of the second part agrees to immediately assign to the party of the first part in proper form, any and all copyrights which the party of the second part may have secured by virtue of this contract and at the same time to return all manuscripts belonging to the said party of the first part.

[fols. 263-270] In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of:

Victor Herbert (L. S.), M. Witmark & Sons, by Jay  
Witmark, Treas. (Seal)

[fol. 271] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed March 3, 1938

Come now the Defendants, Cary D. Landis, individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida, O. C. Parker, individually, and as State Attorney for the Second Judicial Circuit of Florida, A. K. Black, individually, and as State Attorney for the Third Judicial Circuit of Florida, William A. Hallowes, III, individually and as State Attorney for the

Fourth Judicial Circuit of Florida, J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida, Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida, J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida, Murray W. Overstreet, individually and [fol. 272] as State Attorney for the Ninth Judicial Circuit of Florida, L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida, G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida, Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida, J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida, John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida, Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida, "John Doe" and "Richard Roe"; by their undersigned Attorneys, and file this their motion to dismiss the bill of complaint heretofore filed herein for the following reasons, to-wit:

1. That the bill does not state facts sufficient to constitute a cause of action against the Defendants or any of them.

- 1-a. That there is no equity in the bill.

2. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the jurisdictional amount of \$3,000.00, exclusive of interest and costs, is not involved in this suit, in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers, an unincorporated association; and it does not affirmatively appear that the loss of any member of said society due to the enforcement of Chapter 17807, Laws of Florida, 1937, would amount to the sum of \$3,000.00, the [fol. 273] necessary jurisdictional amount.

3. That it affirmatively appears from the allegations of the bill of complaint that the bill is fatally ambiguous in failing to show whether the true party in interest is the

American Society of Composers, Authors and Publishers or its members.

4. It affirmatively appears from the allegations of the bill of complaint, and exhibits attached thereto, that this suit is not one arising under the Federal copyright laws, and that since the jurisdictional amount has not been shown to exist in each member of the said society, the Court does not have jurisdiction of the cause.

5. That it affirmatively appears from the allegations of the bill of complaint, and exhibits attached thereto, that the American Society of Composers, Authors and Publishers, an unincorporated association, cannot suffer any loss due to enforcement of Chapter 17807, Laws of Florida, 1937, due to the fact that it is an unincorporated association of composers, authors and publishers, and that all the proceeds which the said society collects from the licensing for public performances for benefit of the works of its members, and affiliated members, is divided between the members and affiliates, and, therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself.

6. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto that the jurisdictional amount of \$3,000.00 exclusive of interest and costs, is not involved in this suit, because the plaintiffs have not shown the extent of loss or damage they would [fol. 274] suffer by reason of the enforcement of said State law, as compared with the amount of profit they would make by the non-enforcement of said law.

7. That it affirmatively appears from the bill of complaint, and the exhibits attached thereto, that the plaintiffs have been guilty of laches, in that they have waited over nine months before bringing this suit to enjoin the enforcement of Chapter 17807, Laws of Florida, 1937.

8. That the Act in question, Chapter 17807, Laws of Florida, 1937, seeks by Section 1 thereof to prevent activity within the State of Florida of any combination of a substantial number of the owners or competitors of the copyrights of vocal or instrumental musical compositions when one of its objects is to fix prices or to restrain trade and competition in such musical compositions, or to prevent free compe-



tition among the owners or proprietors thereof, and that all of the provisions contained in Section 1 of said Act are within the powers of this State to enact into law.

9. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the plaintiffs and each of them are engaged in interstate commerce, and that they are violating the provisions of Title 15 U. S. C. A. Sec. 1 et seq., commonly known as the Sherman Anti Trust Act, and that, therefore, they have come into this Court with unclean hands, and equity will not grant them any of the relief prayed for therein.

10. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, [fol. 275] that the plaintiffs are engaged in intrastate commerce within the State of Florida, and that by reason of the unlawful combination through which they are operating they are violating the provisions of Section 1 of Chapter 17807, Laws of Florida, Acts of 1937, as well as the provisions of Chapter 6933, Laws of Florida, 1915, as amended by Chapter 10283, Laws of Florida, 1925, Section 7944-7954, inclusive, C. G. L. 1927, the general laws of Florida, prohibiting combinations or monopolies, such as the plaintiffs are engaged in, and that, therefore, the plaintiffs having come into a court of equity with unclean hands, they are not entitled to any of the relief prayed for in the bill of complaint.

11. That it appears from Chapter 17807, Laws of Florida, 1937, that Section 2-A to 2-C, inclusive, in no way conflicts with the provisions of the copyright laws of the United States, (Mar. 4, 1909 c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17 U. S. C. A.), but assures to the author, composer, publisher or proprietor the protection of the individual copyright by requiring persons purchasing the works of the authors, composers, publishers or proprietors to be used for public performance for profit, to pay the amount so designated thereon by the owner of said works.

12. That it affirmatively appears that Section 3 of Chapter 17807, Laws of Florida, 1937, which declares unlawful the enforcement within the State of Florida only said contracts of the unlawful combination in reference to copyrighted musical compositions, merely restates the common law and the general statutory law on this ground in force [fol. 276] in the State of Florida at the time of the passage

of this Act, as is indicated by Sections 7944-7954, inclusive, C. G. L. 1927, and that it is within the police powers of the Legislature of the State of Florida to so define, prohibit and prevent the enforcement of said illegal contracts.

13. That Sections 4-a, 4-b, 5-2, 5-b, and Section 6 of said Chapter 1708, Laws of Florida, 1937, are nothing more than the exercise of a valid police power by the Legislature of the State of Florida to protect persons, firms and corporations within the State of Florida from unlawful collections or exactions of royalties by the plaintiffs through a monopoly agency or affiliates of a monopoly should the monopoly seek to enforce or compel alleged rights to copyrighted music within this State in violation of the statute.

14. That Sections 7-a, 7-b and Section 8 of said Chapter 17807, Laws of Florida, 1937, do nothing more than define agencies and representation of such unlawful combination declaring the violation of this Act to be a felony and providing the punishment therefor, all of which definitions and requirements are within the right of the Legislature of the State of Florida to enact into law.

14. That Sections 9, 10-a, 10-b, 11-a and 11-b merely provide the procedure of how persons violating the provisions of this Act may be prosecuted, and they guarantee to any such persons the equal protection and due process of law by affording them a fair and impartial hearing before a legally constituted court of this State, and that the provisions contained in said Section are within the legislative [fol. 277] powers of the State of Florida to enact into the law.

16. That it affirmatively appears from the bill of complaint, and the exhibits attached thereto, that there is a misjoinder of parties plaintiff contrary to the provisions of Rule No. 26 as adopted by the Supreme Court of the United States, and as set forth in Title 28, Section 723, U. S. C., for the reason that said bill of complaint alleges no joint cause of action in said plaintiffs.

Cary D. Landis, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Andrew W. Bennett, Lucien H. Boggs, Of Counsel for Defendants.

[fol. 278] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DENY PLAINTIFF'S MOTION FOR INTERLOCUTORY  
INJUNCTION—Filed March 3, 1938

Come now the Defendants in the above entitled cause, by their undersigned Attorneys, and moves the Court to deny Plaintiff's Motion for Interlocutory Injunction and for ground for said Motion say:

1. That the Court will consider each and every of the allegations of the motion to dismiss the bill of complaint as heretofore filed in this cause as grounds for the denial of the plaintiff's motion for interlocutory injunction.

2. That it affirmatively appears from the affidavits filed herein that the plaintiffs individually or jointly have not been threatened with prosecutions for violation of said Chapter 17807, Laws of Florida, 1937, and that if they [fol. 279] should be so prosecuted they have an adequate and complete remedy at law to protect their rights.

3. That it affirmatively appears from the affidavits filed herein that the plaintiffs will not under such circumstances be subjected to a multiplicity of suits or that they will in any way suffer an irreparable injury which they cannot be easily and adequately compensated for at law.

4. That it affirmatively appears from the affidavit filed herein that any loss or damage which the plaintiffs have suffered herein has been due to their own conduct, because they have failed and refused to accept payments tendered them under existing license in the State of Florida.

5. That no exceptional circumstances are shown which would allow a Federal Court to enjoin State officers from the prosecution of a State Criminal Statute because it affirmatively appears:

(a) That the plaintiffs have an adequate remedy at law.

(b) That the plaintiffs have not been threatened with prosecution for violation of said State Statute.

(c) That plaintiffs will, under no circumstance, be subjected to a multiplicity of suits.

(d) That plaintiffs are in no-immediate danger of great and irreparable injury or loss.

(e) That plaintiffs have been guilty of laches in that they have waited over nine (9) months since the passage of [fol. 280] this law to bring any action testing its constitutionality.

(Signed) Cary D. Landis, Attorney General;  
(Signed) Tyrus A. Norwood, Assistant Attorney General; (Signed) Andrew W. Bennett, Lucien H. Boggs, of Counsel for Defendants.

[fol. 281] **Affidavits in Support of Motion to Deny Motion for Temporary Injunction—Filed March 3, 1938**

IN UNITED STATES DISTRICT COURT

[Title omitted]

**AFFIDAVIT OF CARY D. LANDIS, ATTORNEY GENERAL**

This day personally appeared before me, the undersigned authority, Cary D. Landis, who, after being duly sworn, deposes and says that he is the duly elected and qualified Attorney General of the State of Florida, who, under and by virtue of the Provisions of Section 9 of Chapter 17807, Laws of Florida, 1937, must direct prosecutions; civil and criminal, for violations of said Act.

That, although he has been and is ready and willing to prosecute any violations of said Act, no violations thereof have been called to his attention, and, upon information and belief, avers that there has been no violation of said act in this State since its passage. That he has not, and has not authorized anyone on his behalf to, threaten anyone for the prosecution of said Chapter 17807, Laws of Florida, 1937.

(Signed) Cary D. Landis, As Attorney General.

Subscribed and sworn to before me this 28th day of February, A. D. 1938. Evelyn Davis, Notary Public, State of Florida at Large. My Commission Expires Mar. 7, 1939. (Seal.)

[Title omitted]

## AFFIDAVIT OF W. WALTER TISON

W. Walter Tison, being duly sworn, deposes and says.

That he is the manager of radio station WFLA, located in Tampa, Florida, with additional offices in Clearwater, Florida; that said radio station first commenced operation about 1925 and has operated continuously since that time; that said station operates with a power of 5000 watts during the day time and 1000 watts at night pursuant to a license from the Federal Communication Commission; that the only radio station located in Tampa is station WDAE, owned and operated by The Tampa Daily Times; that said station commenced business prior to the establishment of radio station WFLA, and that it also operates with a power of 5000 watts during the day time and 1000 watts at night pursuant to a license from the Federal Communication Commission.

That radio station WFLA caters to the same potential listening audience in and about the City of Tampa, Florida, as radio station WDAE, and during the time of its existence, [fol. 283] it has been and continues to be in direct competition with said radio station WDAE in the sale of its broadcasting facilities to the radio advertising public located in the Tampa trade territory.

That radio station WFLA has a license issued by the American Society of Composers, Authors and Publishers, one of the complainants in the above entitled suit, which authorizes such station to perform any or all of the musical compositions owned or controlled by any member of said Society, or by any member of a foreign society affiliated with said Society, which license provides amongst other things that the said Society in its discretion and without any reason therefor may withdraw from public performance any copyrighted musical compositions coming under the provisions of said license.

That he has examined the form of license attached to the complaint herein as Exhibit F, entitled "Operator's Broadcasting License", and that the terms and conditions stated in said Exhibit are identical with the terms and conditions of the license of radio station WFLA except as to the amount of the fixed fee stated in Line 3, Paragraph 8 of said Exhibit



F. Under the terms of said license contract, radio Station WFLA is obligated to pay to said Society the 5 per cent of its gross income as set out in paragraph 8 of said Exhibit and in the letter dated January 15, 1936, attached thereto.

That the license agreement of radio station WFLA expired by its terms and was renewed by mimeographed form of letter dated January 15, 1936, in the same wording as the letter which is a part of the aforesaid Exhibit F of complainants.

On January 1, 1936, the music publishers, Harms, Inc., Remick Music Corporation, M. Witmark and Sons, and several others, all of which were members of the complainant Society and were owned or controlled by the Warner [fol. 284] Brothers Picture Corporation (hereinafter called Warner subsidiaries) withdrew from membership in the Society; that the withdrawal of the Warner subsidiaries from membership reduced the copyrighted musical compositions coming under the Society's license by approximately 40 per cent of those copyrights which were primarily required for performance purposes prior to January 1, 1936, that the purpose and subsequent effort of the Warner subsidiaries was to license the public performance of its copyrighted musical compositions independently of said Society. A strenuous effort was made to persuade the complainant Society to reduce the amount of fee or royalty fixed and determined by it to an amount commensurate with the loss of copyrights occasioned by the withdrawal of the Warner subsidiaries. The complainant Society refused to make any reductions in the fees demanded by it, but insisted that the same fees be paid for the depleted material. Radio station WFLA received a telegram from complainant Society, dated January 10 or 11, demanding that the station accept the Society's offer not later than January 15, and that if such acceptance was not received on or before January 15, said Society would proceed to prosecute station WFLA for infringement in respect to the broadcast of any copyrighted musical composition controlled by said Society. Because of the fact that it is and has been impossible to operate a radio broadcasting station "in the public interest" as is required by the Federal Communication Commission license without performing some of the copyrighted musical compositions controlled by the Society, Radio Station WFLA was compelled to accept the demands of the Society and re-

new its license for the depleted repertory of the Society [fol. 285] upon the same terms and conditions and for the same fees which should have paid for both the copyrights acquired by it under the renewed license and also the copyrights controlled by the Warner subsidiaries. The demands as made by the complainant Society to all radio broadcasting companies is set out in the "Report on Copyright", dated February 18, 1936 of the National Association of Broadcasters, referred to on page 28 of the affidavit of Gene Buck in support of the motion for a preliminary injunction. Attached hereto and made a part hereof is a complete printed copy of the "Report on Copyright", referred to by the complainant Buck.

As heretofore stated, it is impossible for radio station WFLA to operate without performing some of the copyrighted musical compositions controlled by the complainant society, and under the terms of the contract demanded by the Society from said station, the station must pay to the complainant Society 5 per cent of its income whether copyrights controlled by the Society are used in a particular program or whether copyrights controlled by some outside party are used. Under such circumstances the said station can not economically afford to acquire a license from any copyright owner other than the license from the Society and pay such other copyright owner for the use of his material. To make such payment to any other copyright owner would mean that said station would be compelled to pay additional sums over and above the percentage demanded by the Society. Under such circumstances the station must and does refuse to acquire licenses to perform copyrighted musical compositions from any individual or group of individuals other than the said complainant Society.

Subsequent to January 1, 1936, representatives of the Warner subsidiaries above referred to attempted to license the use of their copyrighted compositions to said radio station WFLA, but for the reasons above stated, said station refused to acquire said license. On August 1, 1936, the Warner subsidiaries reentered the complainant Society as members thereof, and gave up its efforts to function independently of said Society, and thus again incorporated all musical catalogs under the said Society's license.

[fol. 286] Attached hereto and made a part hereof is a photostatic copy of a certificate issued by the Copyright

Office of the United States which sets forth the total number of registrations of copyrighted renewals from January 1, 1909 to December 31, 1936, inclusive.

The said complainant Society through various of its officers has repeatedly claimed that it controlled substantially all of the usable copyrighted music in the United States. However, at no time has radio station WFLA, or so far as your deponent knows, has any radio broadcasting station or other user of copyrighted music been able to obtain a complete or even substantially complete catalog of the copyrighted musical compositions for which ASCAP demands its fees. In other words, radio station WFLA and so far as your deponent knows every other user of copyrighted music has been compelled to accept ASCAP'S demands without definitely knowing exactly what was being purchased. Moreover the burden of determining whether a particular musical composition comes under the purview of the complainant Society's license heretofore has been and still is upon the user. .

Checks of registrations of copyrighted musical compositions in the office of the Register of Copyrights, Washington, D. C. indicate that approximately 60 per cent of all the published copyrights in the United States are under the control of said Society. This means that the Society probably controls the performance rights of approximately 400,000 copyrighted musical compositions. Manuscripts as distinguished from published copyrights are not generally available to a user of music for performance purposes since such manuscripts are not offered for sale and do not become [fol. 287] available for the use of the general public until such time as they are published. When a manuscript is published for general distribution, it is entered in the copyright office as a published copyright and becomes part of the copyrighted music of the country.

(Signed) W. Walter Tison.

Subscribed to and sworn to before me this 27 day of February 1938. Evelyn Davis, Notary Public, State of Florida at Large. My Commission expires March 7, 1939. (Seal.)

# The National Association of Broadcasters

NATIONAL PRESS BUILDING \* \* \* \* \* WASHINGTON, D. C.  
JAMES W. BALDWIN, Managing Director

## NAB REPORTS

Copyright, 1936. The National Association of Broadcasters

*Special*  
FEBRUARY 18, 1936

### REPORT ON COPYRIGHT

Submitted to the Board of Directors at a meeting held in Chicago, Illinois, February 3, 1936

*To the Board of Directors of the National Association of Broadcasters:*

You have been called to this meeting held February 3, 1936, primarily for the purpose of considering questions of vital importance to the broadcasting industry in the field of copyright. To assist in your determination of these questions, I have prepared this report setting forth the facts as I find them, and closing with certain conclusions and recommendations submitted for your consideration.

By resolution adopted on December 17, 1935, at your last meeting, you conferred broad authority on me to negotiate in behalf of independently-owned stations for copyright licenses. Pursuant to that resolution, over 300 broadcasters gave me powers of attorney to act for them in the crisis which was at hand. This response far exceeded the fondest hopes even of those who voted for the resolution, and represented a unified action in the broadcasting industry beyond anything yet seen. Further pursuant to that resolution, I assembled an advisory committee which I am sure you will agree was truly representative of various classes of independent stations and was composed of able and conscientious men. These men worked long and laboriously with me through two sessions in New York, one of them from December 27 to December 31, 1935, and again on January 10-11, 1936, and I had the constant advice and assistance of several of them in the interim between the two sessions.

Notwithstanding these facts, I regret to report that, so far as ASCAP is concerned, the result was a complete and humiliating failure. This fact is a challenge to the Officers and Directors of the NAB, and to every broadcaster in the United States. How did it come about that the combined negotiating power of over 300 broadcasting stations (including most of the larger independent stations) could be not only utterly ignored but be treated with contempt? One of the principal purposes of this report is to set forth and analyze the facts to determine the answer to this question. This, it seems to me, is necessary in order to decide upon the future course of action of the NAB in the field of copyright, and to avoid any mistakes that may have been made in the past.

In Parts VII and VIII of this report I have set forth my conclusions and my recommendations and shall not anticipate them in detail here. It is necessary, however,

to say a word in advance. Whatever approach is made to the study of the causes of the repeated failure of NAB negotiations with ASCAP, the path leads inevitably to certain basic causes which are familiar to everyone, such as ASCAP's monopolistic power, combined with lack of availability of sufficient non-ASCAP music and with defects in the copyright law. More recently, however, there has been added to these basic causes a factor so important as to have been well nigh a determining influence in all negotiations. I refer to the discriminatory contracts enjoyed by the two national network companies, combined with the power indirectly given to ASCAP by the contracts which those companies have with affiliated stations, under which the latter are obligated to have ASCAP (and other) licenses. As I shall point out, this factor (in addition to the basic causes) more than anything else brought about our recent defeat, and will continue to stand in the way of success of any fair and equitable copyright program NAB may adopt, whether it be per-piece, measured service, or some other kind of system.

If I am correct in this conclusion, then, if NAB is to continue to function in the field of copyright and fairly to represent the great majority of its membership, among its principal objectives should be

1. Elimination of all discriminations in contracts with ASCAP and other licensing pools.
2. Elimination of the requirement in network-affiliate contracts that affiliate stations have licenses from ASCAP or any other licensing pool.
3. Clearance of copyright at the source on network programs, to the end that the network is responsible for the obtaining of licenses and the payment of fees on network programs broadcast by affiliate stations.

Obviously, in the absence of assent by the network member stations of the NAB, these objectives cannot be striven for without a division in the ranks of the Association with all the consequences this would entail. On the other hand, these objectives cannot be ignored without forcing upon the great majority of independent stations a realization that to have any measure of success in future copyright negotiations they must unite outside of NAB and act independently of it. As I see it, the issue for them is not whether they shall or shall not have a per-piece or measured service plan (although, in view



of the fact that the NAB has gone on record in favor of such a plan at its last three conventions, this issue is extremely important). The issue is, whether they are to have *any voice whatever* in determining what agreements they will enter into with licensing pools. So far they have been denied that voice.

Broad as were the powers given me by the resolution of December 17, 1935, I do not construe them as authorizing me definitely to commit either the Board or the Association to either course. It seems to me that a choice must quickly be made between

1. a comparatively innocuous course avoiding any issue wherein the interests of the networks are opposed to those of the independent station, and

2. a militant course which would include the objectives above set forth.

This report is, therefore, also a request for instructions from the Board of Directors by whom I am employed and to whom I am responsible. It may be that the Board will feel that this issue is so far-reaching that it should be submitted to the membership either at the next Annual Convention or at a Special Meeting to be called at an earlier date.

In view of the importance which attaches to the discriminatory contracts, I have, at some length, summarized their nature, their history and their effect on our negotiations, in order that, as nearly as is in my power, the correct facts shall be before the Board. Other headings included in this report explain themselves.

## I. ANALYSIS OF TOTAL COPYRIGHT FEES PAID BY BROADCASTERS IN 1935

This analysis is of fundamental importance to an understanding of the present situation. First, it explains the basis for one of the principal complaints against ASCAP by the overwhelming majority of independent broadcasters, as well as the principal obstacle to negotiation of a per-piece or measured service plan. Second, it explains one of the principal reasons leading to the withdrawal of the Warner Brothers group of music publishing houses from ASCAP, i.e., that, because of the discriminatory contracts in favor of the networks, a large portion of the broadcasting industry's net receipts is escaping the payment of fees for the use of copyright music.

For the sake of simplicity and because of lack of data on other licensing organizations, this analysis will be confined largely to copyright fees paid to ASCAP, and will be made in round numbers.

The broadcasting industry paid ASCAP approximately \$2,995,000 in 1935, or, in round figures, \$3,000,000. Of this sum about \$850,000 consisted of sustaining fees, and about \$2,150,000 of fees paid on so-called net receipts of broadcasters on commercial programs. The sum of \$2,150,000 represents 5% of \$43,000,000. The term "net receipts," as defined in ASCAP contracts, refers to the full amount paid to the broadcaster for the use of his broadcasting facilities after deducting commissions not exceeding 15%, if any, paid to advertising agents or

agencies not employed or owned in whole or in part by the broadcaster. Even if it be assumed that 15% has been paid in all cases (which is, of course, not the fact), net receipts of \$43,000,000 would correspond to less than \$51,000,000 of gross receipts.

The fact is that, as nearly as can be calculated on the basis of data now available, the gross receipts of the broadcasting industry for 1935 were about \$87,500,000 and, if a 15% commission were deducted in all cases (which, as already stated, is not the fact), the net receipts were about \$74,000,000. From these figures it is clear that about \$30,000,000 or more of net receipts (corresponding to about \$35,000,000 of gross receipts) is escaping the payment of copyright fees.

The overwhelming majority of independent broadcasters are paying ASCAP 5% of their net receipts and the discrepancy is not due to them. The discrepancy is due primarily to the discriminatory contracts mentioned at the outset.

Let it be assumed that \$74,000,000 represents the net receipts of the broadcasting industry and that \$2,150,000 represents the sum (exclusive of sustaining fees) paid to ASCAP for the year 1935. If the entire broadcasting industry were paying on a uniform non-discriminatory percentage basis, each broadcaster would have paid 3% of his net receipts (instead of 5% as at present). If sustaining fees were abandoned and all fees reduced to a percentage basis, the total of \$3,000,000 received by ASCAP in 1935 would represent about 4% of each broadcaster's net receipts (instead of 5% plus a large sustaining fee as at present). If the percentages be figures in terms of the gross receipts of \$87,500,000, each broadcaster need have paid only about 2.5% plus his sustaining fee, or less than 3.5% without any sustaining fee.

The discriminatory ASCAP contracts, so far as they are known, consist (1) principally in the contracts of the two national network companies, and, to a much smaller extent, (2) in the contracts of about 48 newspaper-owned stations, and (3) the contract of WCAU, Philadelphia. The nature of the discriminations will be briefly described.

1. *The Network Contracts.* The two national network companies (NBC and CBS) pay nothing to ASCAP as networks. Each company pays a sustaining fee plus 5% of net receipts with respect to each station owned or controlled by it, NBC with respect to 14 stations (KDKA, KGO, KOA, KPO, KYW, WBZ, WEA, WENR, WGY, WJZ, WMAL, WMAQ, WRC and WTAM) and CBS with respect to 7 stations (KMOX, WABC, WBBM, WBT, WCCO, WJSV and WKRC).

Neither company pays any sustaining fee or percentage of net receipts on revenue received from advertisers for the facilities of affiliated stations, not owned or controlled by the network company. For example, Station A, independently owned but affiliated with NBC, may have a rate of \$300 an hour at which rate its facilities are sold by NBC to a network advertiser. Of this \$300, NBC pays only \$50 to Station A and keeps \$250. Station A pays ASCAP 5% of the \$50 received by it; NBC pays ASCAP nothing on the remaining \$250.



Furthermore, neither company pays 5% on the total net receipts even of its own stations. By a process of bookkeeping or by use of subsidiary corporations, only a portion of what is paid by a network advertiser is credited to these stations and subjected to the 5% fee. For example, Station B, owned by NBC, may have a rate of \$1200 an hour at which rate its facilities are sold by NBC to a network advertiser. Of this \$1200, NBC may credit the station with only \$400 and retain \$800 as "network" receipts. NBC pays the 5% fee only on the \$400.

While complete exact figures are not available (due in part to the unwillingness of the networks to supply them), sufficient are at hand to give some idea of the amount of net receipts which thus escape taxation by ASCAP. The following figures show what was actually paid to ASCAP by the two national network companies during 1934 and during the first six months of 1935.

	1934		
	Sustaining Fee	Advertising Fee	Total
NBC	\$173,500.00	\$137,541.96	\$311,041.96
CBS	68,500.00	106,778.44	175,278.44
Total	\$242,000.00	\$244,320.40	\$486,320.40

<sup>1</sup> One of NBC's 14 stations, KYW, was not acquired until December 3, 1934.

	January 1-July 1, 1935		
	Sustaining Fee	Advertising Fee	Total
NBC	\$ 89,250.00	\$ 89,794.79	\$179,044.79
CBS	34,249.92	68,633.06	102,882.98
Total	\$123,499.92	\$158,427.85	\$281,927.77

Multiplying the six-months figures by two, we arrive at the following payments made by the two national network companies to ASCAP in 1935:

	Sustaining Fee	Advertising Fee	Total
NBC	\$178,500.00	\$179,589.58	\$358,089.58
CBS	68,499.84	137,266.12	205,765.96
Total	\$246,999.84	\$316,855.70	\$563,855.54

According to the above figures, the two network companies paid substantially \$247,000 out of the total of \$832,000 in sustaining fees received by ASCAP from broadcasting in 1934, or 29.7%.

According to the above figures, the two network companies paid substantially \$317,000 out of the total of \$2,150,000 in advertising fees received by ASCAP from broadcasters in 1935, or 14.7%. The sum of \$317,000 represents 5% of \$6,340,000 net receipts.

It is now appropriate to compare the total net receipts of the two national networks with the total net receipts of the rest of the broadcast industry. Exact figures for the net receipts are not available and a calculation must, therefore, be made on the basis of gross receipts (gross time sales). Even these involve an approximation since

exact figures for the month of December are not yet available. The gross and net receipts for 1935, thus calculated, are as follows:

	Gross Receipts for 1935	
	1st 6-mos.	Total
National Networks	\$26,120,410	\$50,067,686
Regional Networks	465,899	1,110,739
National non-Network	8,591,053	17,063,688
Local	9,898,610	19,281,735
Total	\$45,075,972	\$87,523,848

The national network business, therefore, represents slightly over 57% of the total broadcasting business for 1935. At this point, however, we meet with a lack of information which makes it difficult to reach even approximate conclusions. It is not known how much of the net receipts of the national networks are (a) paid over to affiliate stations, or (b) paid over or credited to stations owned or controlled by the networks. It is also not known how much of the national non-network and the local receipts represent receipts on business of stations owned or controlled by the national network companies. Even with the making of liberal allowances, however, it seems clear that at least the sum of \$25,000,000 (and probably more) of national network net receipts is escaping the payment of any tax to ASCAP. Or, to state the matter in another way, the national network companies are paying ASCAP only about 1% of their net receipts, in contrast to the 5% paid by independent broadcasters.

2. *The Newspaper Contracts and the WCAU Contract.* While the discriminatory features in these contracts permit the licensees to escape a certain amount of the burden borne by other stations, the amount of saving is not known. In any event, the total saving is not large enough so that elimination of the discriminations would make possible any material reduction in the percentage paid by other stations.

## II. ORIGIN OF DISCRIMINATORY ASCAP CONTRACTS

For some years prior to 1932 broadcasters paid ASCAP on the basis of flat annual license fees, payable in monthly installments. The total paid ASCAP in 1932 was approximately \$960,000. The licenses were for short term periods, such as a year or two; the end of each period brought a bitter controversy and almost invariably an increase in fees. While undoubtedly ASCAP attempted in a general way to relate the size of the fee to the importance of the station there was little uniformity and the amounts paid by stations were kept secret. Such discriminations as there were, however, are irrelevant to the present discussion.

In the latter part of 1931, as licenses terminated, renewals were placed on a month-to-month basis and ASCAP let it be known that it was working out a new system of fees. On April 11, 1932, the new basis was

announced by E. Claude, Mills, General Manager of ASCAP, effective June 1, 1932, as follows:

### *Sustaining License*

"At approximately present rates, with such readjustments either upward or downward as will equalize the fee paid by stations operating under similar or equal conditions \* \* \*"

### *Commercial License*

"At 5% of the amounts charged for use of the facilities of the station in respect to all commercially sponsored non-network programs. In the case of network programs, the fee of 5% is payable by the key station based upon the gross amount charged for use of broadcasting facilities \* \* \*"

Thus it will be noticed ASCAP's first proposal recognized that in network programs copyright should be cleared at the source. At that time it was estimated that the gross receipts of the broadcasting industry were between \$50,000,000 and \$60,000,000. The proposal therefore meant an increase in the total fees to be paid ASCAP of over 300%.

An emergency meeting of the NAB Board was held in New York April 18-19. As a result of conferences with Mills a moratorium until September 1st was decided upon in order to permit negotiations. A special copyright committee was appointed by the NAB Board to carry on negotiations with ASCAP, consisting of Morency, WTIC, Chairman; Ashby, Vice President of NBC; Kläuber, Vice President of CBS; Cummings, WOAI; and Shaw, WMT. Cummings and Shaw were thereafter unable to be present or to participate in the committee's work, so that the committee in reality consisted of Morency, Ashby and Kläuber. A plenary committee was created to survey the entire music situation. The NAB addressed a formal communication to ASCAP in which it refused to accede to the ASCAP proposal and pointed out, among other things, the unsoundness of the proposed basis for assessing fees, particularly with respect to programs in which no use is made of copyrighted music controlled by ASCAP.

The negotiating committee thereupon proceeded to have conferences with ASCAP representatives. The plenary committee considered a survey of music in the public domain as well as a study of the foreign music copyright situation. Oswald F. Schuette was engaged as a sort of generalissimo, with his principal duties on the legislative front. Since the legislative history of this period, while important, is of only incidental relevancy to this discussion, it will be passed over. A further meeting of the NAB Board was held in Chicago on May 24th. A special meeting of the NAB negotiating committee, the plenary committee and others (including the presidents of the two networks) was held in New York on July 6th. No progress, however, had yet been made by the negotiating committee.

Finally, Mills and the NAB negotiating committee worked out a proposition whereby the broadcasters would

pay a flat increase of 25% for one year beginning January 1, 1933, during which period a legislative truce in Congress would be declared and further negotiations would be undertaken towards an acceptable basis. The NAB Board was called into a special session in New York on July 21st. It rejected the proposal, principally because of the provision for legislative truce, and made a counter-proposal calling for a 25% increase for two years during which time a joint committee of the NAB and ASCAP would cooperate in drafting a scale based on a "per-piece" arrangement. This proposal was submitted to Mills on July 26th by the Negotiating Committee and was rejected by the ASCAP Board on the following day, apparently by a very close vote.

On July 28th Mills made an announcement virtually breaking off negotiations. Orally, however, he announced new terms consisting of a modification of the proposal first made on April 11th. These terms consisted of a sustaining license fee, as previously proposed, plus a percentage of gross receipts for a period of three years, the percentages being 3% the first year, 4% the second year and 5% the third year. The same principle was followed with respect to network programs as in the proposal of April 11th; namely, that the networks should bear the entire cost on network programs, in other words, that copyright should be cleared at the source. In response to a letter from the NAB Negotiating Committee, Mills indicated willingness to reopen negotiations by letter dated August 3rd, in which he stated the modified proposal in written form.

What happened between this date and August 24th is a matter of speculation. A meeting of the NAB Board was held on August 24th in New York and at that meeting the Negotiating Committee presented another proposition from ASCAP with the following recommendation:

"The committee believes that the foregoing settlement is the most favorable that can be reached and recommends that the Board accept it and recommend its acceptance by the independent stations."

This final proposal was the same as that announced by Mills on July 28th with one very important exception. The exception was that the networks would not pay anything on their receipts as networks but would pay only royalties on the net sales of each station owned and operated by them, whereas network affiliates would pay the percentage rate on their receipts on network as well as on non-network commercial programs. After a tumultuous session the Board voted acceptance of the report, with four representatives of independent stations not voting. A number of the Directors that voted for it did so only because under the circumstances they felt they had no alternative.

In the course of the weeks that followed more favorable contracts were also negotiated by a group of newspaper-owned stations. Under the terms of these contracts the newspaper-owned stations were to pay (1) a sustaining fee of 50% of the fee previously paid; (2) 3% of receipts up to an amount equal to 50 times the sustaining



fee, and 5% of receipts above that amount, and (3) in any event, a minimum fee of not less than 4 times the sustaining fee.

WCAU, Philadelphia, also negotiated a more favorable contract. In its case the percentage is based on receipts from programs using music and the contract contains other advantageous provisions, consisting chiefly of a low sustaining fee and the privilege of deducting legitimate salesmen's commissions.

While a number of incidental facts are in doubt and open to controversy, the conclusion is inescapable that during the final hours of the negotiations the NAB Negotiating Committee directed its efforts toward relieving the networks of the burdens that would have fallen on them under Mills' proposal of July 28th, and transferring a substantial share of this burden to the independently-owned affiliate stations. Under these circumstances it is not surprising or open to serious criticism that in their later negotiations other stations, including the newspaper group, attempted to secure concessions. In fairness to the newspaper group it should be stated that its leaders and spokesmen have regularly proved willing to cooperate with other independent stations in the attempt to obtain from ASCAP a per-piece or a measured service plan available to all stations on a non-discriminatory basis. So far as publicity is concerned (including the allegations in the government's suit against ASCAP), however, the newspaper contract has been the chief target as an example of discrimination, while comparatively little has been printed about the much greater discrimination involved in the network contracts which, as hereinafter shown, were fundamentally responsible for the recent failure in NAB's negotiations with ASCAP.

### III. RENEWAL OF THE DISCRIMINATORY CONTRACTS IN JUNE, 1935.

Assurances given by Mills in 1932 that the forced acceptance of the new ASCAP contracts did not foreclose further negotiations and that ASCAP stood ready to consider a revision at any time were, with minor exceptions, not borne out by later events. On October 10, 1932, ASCAP did announce that it would not require payment of royalties on political speeches, the national election campaigns being then in full progress, and, in the case of many of the smaller stations, there were reductions in sustaining fees, the total reduction, however, not amounting to very much.

During the fall of 1932, Mills assured Schuette that he was willing, subject to the approval of the ASCAP Board, to limit royalties to programs using ASCAP music, but on November 2nd the ASCAP Board went through the familiar process of refusing to ratify the proposal. Tactics such as these were to be repeated over and over again during the ensuing three years, principally on occasions when ASCAP had reason to fear some concerted or effective action on the part of the broadcasting industry and desired to delay such action.

At the NAB Annual Convention, held in St. Louis on November 14-16, 1932, Schuette was given broad authority and a resolution was unanimously adopted declaring that

"the composers and publishers are entitled to fair compensation, measured in proportion to the actual use of their compositions"

and, by other actions, the basis was laid for the three-point program of the NAB discussed under a later heading, which was formally put into motion at a NAB meeting held in New York on April 5, 1933.

Immediately after the Convention Schuette made a proposal that royalties be 4% of revenue from programs using ASCAP music, plus a sustaining fee. Mills responded that action on this proposal must await an ASCAP Board meeting in January. In a letter dated January 18, 1933, Mills offered to reopen negotiations but declared that under no circumstances would he deal with Schuette (who was sending out some rather vigorous circulars to all stations, having to do principally with "plugging" and "restricted" ASCAP numbers).

On January 24, 1933, announcement was made that Hon. Newton D. Baker had been retained and on February 20-21, 1933, an NAB Board meeting was held in Washington at which Mr. Baker's partner, Mr. Hostetler, was present and stated his plans for future activity. It was decided that Schuette's work was henceforth to be confined principally to the Radio Program Foundation proposal. Mills immediately extended an invitation to Baker to enter into negotiations. These negotiations came to an abrupt end on April 4, 1933, when at a meeting with Hostetler, Levy and McCosker, Mills announced point blank that there would be no revision of the contracts except upward.

Immediately after the NAB Board meeting of April 5, 1933, when the three-point program was definitely decided upon, Mills communicated with Baker and informed him that he was again ready to talk over matters. Baker replied on April 6th that he would be willing to talk only if it were understood in advance that the basis would be in the direction of a per-piece plan and that, during the working out of such a plan, the present scale would be amended so that royalties would be paid only on programs using ASCAP music. The ASCAP Board met to consider this proposition April 27th. It turned the matter over to its general counsel, Nathan Burkan, while Mills departed for Europe.

From that time on, for a period of two years, while there were occasional conversations, no progress whatsoever was made in negotiations with ASCAP and nothing occurred in connection with these negotiations that would add to the picture given by the foregoing account. This brings us to the early Spring of 1935.

Before resuming the story of the negotiations at this point, I must call your attention to the situation as a whole in April, 1935. I do this because of some of the statements which have been so widely made as to the reasons for events which took place the following June,

and the charges that those who have worked for the per-piece or measured service plans have been "dividing the industry."

First, let us consider the per-piece or measured service plan. It had been endorsed by the NAB at the St. Louis Convention in November, 1932, after a proposal made by Schuette for a measured service plan had been turned down by ASCAP. It was endorsed again by the NAB at the White Sulphur Springs Convention in October, 1933. It was endorsed again by the NAB at the Cincinnati Convention in September, 1934. It was endorsed again by the NAB at the Colorado Springs Convention in July, 1935. Throughout this period the plan was expressly or impliedly endorsed at many meetings of the NAB Board of Directors, among which need be mentioned only the meetings held in Washington, May 14, 1934, and in New York on June 22, 1935. It was the basis of all negotiations with ASCAP conducted, first by Schuette and later by Baker and Hostetler, for the entire three-year period, and this fact was made clear beyond question in reports made by Hostetler and others at the White Sulphur Springs, the Cincinnati, and Colorado Springs Conventions. Prior to the Spring of 1935, either expressly or tacitly the two networks and Levy gave approval to what was being done by Hostetler and others negotiating in behalf of the industry. Large contributions were sought from and made by independent stations, as well as by the networks and Levy, for the carrying forward of the program of which this was an integral part. The Government suit against ASCAP, instituted August 30, 1934, had, as one of its principal express purposes, a reorganization of ASCAP so as to establish a system of fees based upon actual use of music and competition between copyright-owners. This was thoroughly explained to and understood by the NAB membership.

Secondly, we should note the progress which had been made on the NAB three-point program by the Spring of 1935. With reference to the Government suit against ASCAP, the Government had won an overwhelming victory on March 26, 1935, when the Court granted the Government's motion to strip the case of irrelevant issues and denied ASCAP's motion seeking to delay trial by permitting the taking of depositions all over the world. By the second week in May, it was clear that trial would be had at an early date, beginning on June 10th. On the legislative side, the Duffy Copyright Bill was moving slowly but surely toward enactment, it being certain by the second week in May that it would be favorably reported by the Senate Patents Committee and would eventually be passed by the Senate. A surprise attempt to commit the United States to the International Copyright Convention had been frustrated and on April 22, 1935, the Senate had rescinded its ratification of that treaty. The only point in which no recent progress had been made was that represented by the Radio Program Foundation, which had lain dormant for a year or more. In addition to all this, ASCAP was torn with internal dissensions and a number of its important members were threatening to withdraw as of December 31, 1935. There was even talk

among some of them of the per-piece plan and there was open talk of a consent decree in the Government suit. As early as December, 1932, it had been reported that ASCAP was working out a revised system of distributing royalties to its own members based on a per-piece plan.

On the whole, therefore, it may be said that never before had the broadcasting industry been in as strong a position to demand justice from ASCAP as it was in the Spring of 1935. By June 1, 1935, it was possible for comments to be made such as appeared in the issue of *Broadcasting* for that date, such as the editorial caption "Old ASCAP—Last Curtain," and the statement "ASCAP appears to be on its last legs as the hard-hearted music trust." Proof of this, if proof is necessary, is furnished by the fact that shortly prior to April 26, 1935, ASCAP invited the broadcasters into a conference which was held that day. With this conference the all too familiar tactics of the past began once more. In behalf of the NAB Hostetler made it clear that any agreement reached must be acceptable to the Government; also, that NAB was on record in favor of a per-piece or measured service plan and that such a plan was contemplated in the Government suit. A six-months' license extension under present terms was suggested, contingent upon any action taken in the Government's suit. The ASCAP spokesmen promised a recommendation to that effect to the ASCAP Board, but it was later turned down.

A meeting of the NAB Copyright Committee was held in New York May 13th. It was understood that representatives of both the broadcasting industry and ASCAP would meet at noon for further discussions to work out a temporary arrangement. There were present McCosker, Chairman of the Copyright Committee; Ward, NAB President; Allen, WLVA; Klauber, CBS; Ashby, NBC; Damm, WTMJ; Russell, NBC; Levy, WCAU; Loucks, NAB Managing Director; and Hostetler. Bennett, special assistant to the Attorney General in charge of the ASCAP suit, was called in. There is a marked difference of opinion as to whether Bennett did or did not make certain statements. According to Levy's statement made later (in the Convention in July), Bennett had said in substance that it would jeopardize the Government's case if the NAB were to ask for anything except an extension of the present contract, and particularly if the NAB were to ask for and secure a more favorable contract. Hostetler has no recollection of Bennett's saying that nothing better could be accepted. Among the others, some apparently corroborate Levy and some Hostetler. Several months later the Department of Justice, through the Hon. John Dickinson, addressed a letter to NAB stating that it is not, and never has been, the position of the Department of Justice that a better contract should not be sought.

In any event, at the meeting with ASCAP that day, ASCAP offered a straight five-year extension. Hostetler opposed this on the ground that it would affect the Government suit adversely. At a meeting held May 23rd the NAB Copyright Committee rejected the proposal and made a counter-proposal of extension of all existing contracts until the conclusion of the litigation. According



to Levy, Bennett had advised the Committee that if this were turned down by ASCAP the broadcasters would then be in the position of having been coerced into accepting the five-year extension and the extension would not be prejudicial to the Government's case. The chairman of the ASCAP committee agreed to submit the proposition to the ASCAP Board, with a reply expected the following week. The ASCAP Board not only rejected the proposal but, pursuing the oft-repeated tactics of the past, sought to alarm the broadcasters by withdrawing the offer of a straight five-year extension.

In the meantime, on May 20, 1935, Loucks, NAB Managing Director, had reached an agreement with Mills for an extension of all licenses from their expiration date, September 1, 1935, to January 1, 1936. This date coincided with the date on which the existing contracts between ASCAP and its members were to expire. The form of extension was approved and, by public announcement in the *NAB Bulletin* (as well as in *Broadcasting*), broadcasters were advised that they might execute and return the extensions.

During this same period there were other proposals made and informally discussed, as to which the record is not clear enough to justify my attempting to describe them. With possibly one or two exceptions, they do not add anything to the picture as a whole. At one point Mills made a proposal which, in the judgment of Hostetler and his associates, was simply intended to divide the industry by arraying the independent stations against the networks, and which therefore was not submitted to broadcasters generally. Failing in this, he apparently decided to pursue the opposite tactics and, by dealing with the two networks and WCAU, to array them against the independent stations. At least, that is what he succeeded in doing and, as is well known to those who have had dealings with him, he has frequently asserted that such was his intent.

It should be noted at this point that during this entire period at least one and probably both of the networks were negotiating for the purchase of the Warner Brothers group and perhaps other publishing houses. I am informed that these negotiations were broken off on June 2, 1935. The fact of these negotiations was not, so far as I know, communicated to the officers, directors or copyright committee of the NAB.

On June 3, 1935, a meeting of the copyright committee was held on short notice in New York. A quorum was not present. Those present were McCosker, Russell, Levy, Klauber, Colin, Kaye, Ashby, Sprague, Loucks, and Hostetler. Mills sent over a proposal contemplating a five-year renewal based on the available catalog rather than on the present catalog, i.e., on whatever catalogs ASCAP happened to have. This, of course, raised a question as to the effect of the threatened withdrawal of the Warner Brothers group. By about 6 p. m.; on that date, no progress had been made. Hostetler and Loucks still opposed a straight five-year extension; Levy and others were in favor of it.

Finally, Levy telephoned Mills and asked whether ASCAP would agree to a straight five-year extension. Mills assented. The Committee, after discussion, came to no decision. Levy then informed the Committee that he would meet with ASCAP the following morning and arrange for a five-year extension for his station. He also stated that he would send out a letter to all broadcasters informing them of his action and advising them to do likewise. Hostetler told Levy that if he sent such a letter he should inform all stations of the advantageous features of the WCAU contract. According to Hostetler, Levy said he would. According to Levy, Levy said it was unnecessary since the WCAU contract was well-known, its terms having been voluntarily disclosed at the St. Louis and later Conventions. In any event, it was Hostetler's and Loucks' understanding that McCosker was to get Mills' offer in written form so that it could be submitted to the Copyright Committee and in turn to the NAB Board before it was executed.

The following day Hostetler and Loucks waited at the St. Regis Hotel until about 3:30 p. m. when they had to leave to catch a train for Washington. On arriving in Washington in the evening they learned for the first time that during the day, Levy and the two networks had concluded 5-year extensions of their contracts from January 1, 1936, Levy's contract being renewed without change, and the network contracts being subject to an increase in sustaining fees of \$25,000 each for three of their stations (WEAF, WJZ and WABC). Late in the afternoon Levy had advised Bennett of these renewals by telephone to Washington.

Hostetler, arriving in Cleveland on the morning of June 5th, immediately sent Loucks a letter summarizing his recollection of the understandings at the meeting of June 3rd and expressing his views on the actions of Levy and of the networks. Levy sent out a letter to all stations informing them of the extensions, and advising them to do likewise. He gave, as reasons for the advice, that the Government suit would not be terminated for several years, and that the suit would in no wise be affected by a 5-year extension. He mentioned that Hostetler and Loucks held contrary views to his, but was silent on the subject of the WCAU contract. Thereupon, Loucks circulated the material portions of Hostetler's letter. On June 11th, Levy sent out a second letter, setting forth his views at length. In addition to defending his failure to mention the WCAU contract and reiterating his contention that the Government's suit could not possibly be prejudiced, he asserted that the Copyright Committee

"had been reliably informed that the minutes of ASCAP showed that they intended to increase our payments up to 25% of our gross receipts."

So far as I can discover, the sole basis for this assertion was a statement which had been made by Bennett at the Committee's meeting of May 13th; he told the Committee that the ASCAP minutes showed that one Sol Bernstein had made that proposal to ASCAP.



In his letter Hostetler had referred to the network contracts and stated that he did not see how it was now possible to avoid calling the Court's attention

"to this preference in explanation of the willingness of the chains to execute an extension agreement on the very eve of trial of the Government suit."

Levy replied

"Mr. Hostetler knows full well that reference to the chain contracts are without justification. He is fully acquainted with the situation and *knows* that ASCAP always intended to exact the highest possible tribute from all independents, irrespective of charges against the chains."

This last statement is also apparently based on a statement made by Bennett at the meeting of May 13th as to what he had seen in ASCAP minutes.

On June 11, 1935, trial of the Government's suit commenced. It was apparent from the outset that ASCAP was going to make capital out of the 5-year extensions. Its counsel referred repeatedly to them, and asserted that there could be no question of oppression or unreasonableness because several of the most important units in the industry had entered into extensions at even higher figures than before.

On June 17, 1935, Mills sent a letter to McCosker, advising that all license agreements would be extended to December 31, 1935, and offering (for the first time in writing) a 5-year extension from January 1, 1936.

A special meeting of the NAB Board was called for and held on June 22, 1935, at New York. The opposing parties were heard at length, including Levy, Klauber, Ashby and Hostetler. No useful purpose would be served by a detailed account of their contentions further than to note that emphasis was placed on an alleged lack of preparedness by the Government in its suit, as a reason of the networks seeking 5-year extensions. Also, for the first time, intense opposition to the per-piece plan by both Levy and the networks came out into the open. At the conclusion of the meeting, two resolutions were unanimously adopted by the Board. In one, it reiterated its support of the per-piece or measured service plan and absolved the networks and WCAU of anything improper in their negotiation of extensions. In the other, it upheld Loucks in sending Hostetler's letter to all NAB members.

At the Colorado Springs Convention held July 8-10, 1935, McCosker, Kay, Levy and Hostetler addressed the members at length. Again, no useful purpose would be served by even attempting to summarize their statements. At the conclusion, the Convention approved the resolution of the Board of June 22nd, declaring in favor of the per-piece or measured service plan and absolving WCAU and the networks. Other resolutions were adopted favoring continuation of the Government suit, instructing the NAB officers and directors to support it, and warmly commending Hostetler for his efforts and recommending that he be given an opportunity to continue giving the same service to NAB.

One excerpt from the Convention discussion is, I believe, of sufficient importance to deserve quotation. Church, KMBC, stated that as a network affiliate he had a contract with a network requiring him to have the necessary copyright arrangements. He asked Levy the direct question as to whether such stations now had any choice in the matter. The following colloquy ensued:

"ISAAC D. LEVY: In a legal manner or business manner?"

"MR. CHURCH: Both. In other words, has the action of the networks and yourself almost automatically bound us to the five-year contract with ASCAP?"

"ISAAC D. LEVY: Yes—but pleasantly so."

"MR. CHURCH: I am not questioning that. The point is: do we have a choice in the matter?"

"ISAAC D. LEVY: I don't believe you do."

By the end of July, some 55 stations had applied for and received 5-year extensions of their ASCAP licenses. The 55 included the 21 chain-owned or controlled units, WCAU and several of the newspaper-owned stations; very few of the independent stations not enjoying discriminatory advantages had sought extensions. Mills was promulgating the statement (as he has both before and since then) that ASCAP would still like to secure from the NAB a definite formula for the payment of copyright fees, which he said had never been forthcoming from the Association.

Before the end of the summer it became apparent that, in spite of the assurance given by Mills to McCosker on June 17th, stations other than the original 55 would not be given unqualified extensions of their contracts. Mills was now insisting on adding a rider protecting ASCAP against any obligation to maintain its catalog at substantially its size at the time and limiting the license to the empty right of cancellation of the license "in case there shall be a substantial diminution in the quantity of musical numbers." The rider obviously anticipated the withdrawal of the Warner Brothers group.

On September 23rd the NAB Executive Committee (Fitzpatrick, Levy and Baldwin) met with Mills informally to discuss provisions of the contract offered stations as well as the per-piece method of payment of royalties. In the meantime, it seems, ASCAP officials were privately advising stations to defer signing ASCAP contracts until that organization had put its own house in order, it being felt there was still some possibility that the Warner group would remain with ASCAP. An NAB Board meeting was called for October 17th.

At the Board meeting on October 17th in New York, there was discussion of the advisability of advising stations to seek 5-year extensions of their ASCAP contracts, and the Board instructed the Managing Director to do so. It also instructed him to prepare a report and recommendations dealing with the possible working out of a per-piece or measured service plan. By November 15th, only about 80 stations had signed ASCAP renewals and Mills was quoted as saying that full opportunity would be given all stations to negotiate "new contracts" in the

event of withdrawal by the Warner group. He asserted that the basis for negotiations naturally could not be foretold.

For reasons later explained to the Board, I did not send the letter. On December 3rd, Levy, calling from Klauber's office, insisted that such a message be sent. After consultation with Fitzpatrick, NAB President, I polled the NAB Board and, as a result of a vote of 10 to 9, I sent a telegram instructing them to accept 5-year extensions. Two of the directors thereupon changed their votes, with the result that the vote was 11 to 8 against sending the telegram. Thereupon, I sent a second telegram notifying members not to ask for extensions. In the meantime, a small number of stations had sought and secured extensions so that the total of those who, in addition to the original 55, had such extensions (but with the rider as to repertoire) was slightly over 70.

An NAB Board meeting was called and held in New York on December 9th, 10th, 16th and 17th. The results of this meeting are best treated under the next heading.

#### IV. THE RECENT FAILURE IN ASCAP NEGOTIATIONS

On December 17, 1935, the last day of its meeting held in that month in New York, the NAB Board of Directors designated its Managing Director to act in the emergency created by the approaching copyright crisis created by the expiration of ASCAP licenses on December 31, 1935 and the withdrawal of the Warner Brothers group from ASCAP effective after that date. He was given authority to act for such stations as desired to have him do so, and stations were urged to send him powers of attorney enabling him to negotiate in their behalf. He was also given authority to name and assemble an Advisory Committee to confer and advise with him in New York.

Pursuant to the Board's action over 300 broadcasters executed and sent in powers of attorney. This number included a large proportion of the important independent stations in the country and far exceeded the response which had been hoped for.

Further pursuant to the Board's action, I selected an Advisory Committee, consisting of Messrs. Allen, Caldwell, Carpenter, Church, Clark, Craig, Cowles, Damm, Fitzer, Gough, Loucks and Myers, and on December 24, 1935, sent each of them a wire as follows:

"Will greatly appreciate your advice and counsel during further negotiations on copyright beginning Friday, December 27, St. Regis Hotel Stop I make this request because I believe you are free and willing to exercise your best judgment for industry as whole Stop If I have erred in judgment and circumstances are such that you must be guided by your personal interests or the interests of any group then I expect you to decline invitation Stop Am sure you can appreciate importance of premise upon which invitation is extended Stop Similar invitation extended to (here follows list of names other than the party to whom addressed) Please advise will be in Washington until Wednesday evening."

Of those invited, Messrs. Allen, Caldwell, Carpenter, Clark, Damm, Fitzer and Loucks were able to accept and to be present. Mr. Craig accepted but was unable to be present at the first session.

The Advisory Committee met with me at the St. Regis Hotel, New York, on the morning of Friday, December 27th, and were in continuous session until Tuesday, December 31st. Due to the appearance of the first Warner contract Friday morning, and the necessity for attempting to secure a revision of it, the committee had to subdivide its labors, and a subcommittee consisting of Messrs. Caldwell, Damm and Loucks devoted themselves principally to the Warner negotiations, described under the next heading.

Mills, ASCAP's general manager, left New York just prior to the day on which the Advisory Committee assembled, and remained out of town until Tuesday, December 31st. Buck, president of ASCAP, was out of town from Friday until Monday. This left only Burkan, the ASCAP General Counsel, with whom to negotiate.

On Friday, I had arranged a meeting with Burkan for late in the afternoon. The meeting was delayed by Burkan from hour to hour and finally I was told that he could not see me that day. This, I learned, was because of conferences he was having with network representatives. During the day, the network companies secured from Burkan a letter as follows:

"Confirming our conversation today, this is to inform you that from and after January 1, 1936, you may continue to broadcast and to publicly perform for profit the compositions in the repertory of the American Society of Composers, Authors & Publishers as of January 1, 1936, under your network system without any interruption on and after January 1, 1936, until further notice from the American Society of Composers, Authors and Publishers, such notice to be not less than two-day period. It is understood, of course, that we are not relieving these affiliates of the obligation to pay us performing fees in accordance with existing contracts."

They immediately advised their affiliates of this arrangement by telegraph.

On Saturday morning, December 28th, I succeeded in seeing Burkan. In the course of the discussion, I was clearly given to understand that ASCAP would be willing to grant temporary extensions of the same sort as those accorded to network affiliates on network programs with the understanding that a joint committee representing all interested elements would meet shortly after January 1st to arrive at a definite and permanent solution. I was also given to understand that ASCAP might be willing to accord an extension for a definite period, e. g., 6 months, to broadcasters who had not accepted five-year renewals. With this understanding I returned to discuss such an extension with the Advisory Committee, and, with their approval, sent the stations a telegram as follows:

"Am assured by ASCAP general counsel that temporary extensions of ASCAP licenses will be granted by letter to me at present rates and without signing contracts,



stations and ASCAP each to have right to cancel on two days' notice with understanding joint committee all interested elements meeting shortly after January 1 to arrive definite permanent solution. On Monday expect to ask and obtain six-month extension on this basis. Advise whether I may use if necessary your power attorney on this basis with ASCAP. Negotiations with Warner proceeding today. Langlois & Wentworth, New York City, can furnish 60 fifteen-minute programs public domain music. Transcontinental Broadcasting Company, Los Angeles, can furnish 200 musical selections which can be performed without copyright license cost 60 cents per selection. Both copyright libraries should offer opportunity to avoid Warner music pending adjustment their proposed contract."

Nothing further occurred, so far as ASCAP is concerned, until Monday morning. At that time I conferred with Buck and Burkan. They refused to grant a 6-months or any other definite extension and I was able to secure only an indefinite extension represented by the following letter, signed by Buck, President of ASCAP:

"This is to inform you that such of your member stations and such stations, in respect to which your Mr. James W. Baldwin holds power of attorney to act for them, as do not have licenses from the American Society of Composers, Authors & Publishers (for brevity called "Society"), from and after January 1, 1936, may continue to broadcast and to publicly perform for profit the compositions in the repertory of the Society, as of January 1, 1936, without any interruption on and after January 1, 1936, until further notice from the Society, such notice to be not less than two (2) days.

"It is understood, of course, that we are not releasing these stations (those which are members of your Association and those which are represented by Mr. Baldwin by virtue of powers of attorney) of the obligation to pay the Society performing fees in accordance with the existing contracts."

I accepted this extension in writing.

On the same day, December 30th, ASCAP sent out a wire to all stations which had not already secured 5-year renewals, as follows:

"This is to notify you that the American Society of Composers, Authors & Publishers is prepared to extend your present license agreement with it upon the same terms and conditions for five additional years from January 1, 1936, except that the rights granted by the Society shall be limited to compositions of the membership as constituted on January 1, 1936. The Society challenges the claims made by others to ownership in the small performing rights of various compositions published by them but written and composed by members of the Society. The Society controls the performing rights of many of such compositions and within a very short time will publish a list thereof. As our examination of individual contracts progresses we are confident that our repertory will be increased in respect of many compositions the performing rights of which are exclusively claimed by others. To illustrate published reports that the Society can no longer license small performing rights in the works of George M. Cohan, Victor Herbert and some others are absolutely without foundation. The Society

has the right to grant licenses in respect of these works and will protect all its licensees broadcasting the same. While we of course have no objection to your taking any other licenses which you may desire to take we feel it only fair to tell you that your fee to the Society will not be reduced and the formula will not be altered except that the license will be limited to works in Society's repertory as of January 1, 1936, and furthermore to advise that with respect to any composition the licensing rights of which are exclusively vested in us we will not recognize any license which you may obtain from others."

I immediately sent out wires to all stations advising them of the temporary extension accorded by Buck's letter and advising them not to accept the 5-year extensions offered in the above-quoted telegram. It is my understanding that approximately 400 stations followed this advice and refrained from taking the 5-year extensions.

We immediately turned to the task of preparing the way for the joint discussions with ASCAP which Burkan had given me to understand would now take place. Since one of the oft-reiterated complaints of ASCAP had been the lack of definite proposals by NAB which could be used as a basis for discussion, I set to work to prepare a statement of principles which should guide our negotiations and state our objectives, in a manner suitable for serving both as a basis for discussion and as a proper way to advise the NAB membership of our activities. With the completion of a draft statement, I called the Advisory Committee to meet with me again in New York on January 10th, to discuss it with me and, after putting it in final form, to take it up with ASCAP. Both ASCAP and the networks knew that this meeting was being held.

On Friday, January 10th, we spent the entire day in putting the statement into final form and by evening it was completed. At a late hour, approaching midnight, I was called by a third party and was told for the first time that during the evening the following wire had been sent by ASCAP to about 400 stations:

"On December 30, 1935, the ASCAP offered to extend your present license agreement upon the same terms and conditions for five additional years from January 1, 1936, except that the rights granted by the Society to you shall be limited to compositions of the membership as constituted on January 1, 1936. To this wire the Society has received no answer and unless we hear from you by January 15 that you accept such offer the Society will deem you to be an infringer in respect of the performances and broadcasting of any of its works and you shall be held to strict accountability on account of all performances of its works beginning January 1, 1936."

I immediately made every effort to get in touch with the ASCAP officials, without success. I also immediately telephoned Ashby and Klauber and found that both knew of the telegram. Both of them vigorously defended ASCAP's action. Several days later, an ASCAP official informed a member of the NAB Board of Directors that the telegram had been sent at the insistence of the two networks. If this be true it means, of course, that over 300 independent broadcasting stations in this country

were deprived of their liberty of contract and of their last opportunity to negotiate by joint action of the networks and ASCAP.

The following day, Saturday, January 11, every effort was made, both directly with ASCAP and by contact with the networks, to secure a reconsideration of ASCAP's action. During the day I sent a wire to stations as follows:

"Am advised ASCAP last night wired all stations that unless they communicate acceptance of five-year offer by January 15 they will be deemed infringers. This in effect appears to be cancellation of temporary arrangement based on Buck's letter of December 30. Consequently, if you need ASCAP music suggest you wire acceptance to ASCAP on January 15 but not before in order that give me benefit of such last-minute desperate efforts as I can make."

For a while there seemed a faint hope that I might be permitted to appear at an ASCAP Board meeting to be held Tuesday, January 14th, and to argue in favor of a withdrawal of the ultimatum. The statement which had been agreed upon with the Advisory Committee on the preceding Friday was printed and circulated to the members on January 13th as an NAB Bulletin with the title "Tentative Program of Activity in Behalf of the NAB." Copies were immediately sent to ASCAP and the two networks. All efforts, however, were unavailing and on January 14, I sent the following telegram to all stations who had given me powers of attorney:

"ASCAP has refused request for stay of their action taken tenth Stop This leaves no alternative for stations that must use ASCAP music but to accept offer contained Buck's telegram December 30 Stop Have not used your power of attorney to bind you in any way Stop Because some stations for which I hold power attorney have already accepted ASCAP offer per my wire eleventh and others have indicated they may not accept suggest it is best under all circumstances and my future plans toward reformation of contracts that you clear matter yourself by addressing telegram to ASCAP not later than fifteenth stating you accept Buck's offer thirtieth."

On January 15th the ASCAP ultimatum went into effect and by the close of that day practically all broadcasting stations had been forced to wire ASCAP for extensions of their 5-year contracts.

#### V. NEGOTIATIONS WITH THE WARNER BROTHERS GROUP OF MUSIC PUBLISHERS

By May 15, 1935, it became generally known that the Warner Brothers group of music publishing houses (Harms, Inc., T. B. Harms, Witmark, Remick and New World) had stated that they were planning not to renew their memberships in ASCAP, which memberships expired December 31, 1935, and that thereafter they would deal in their own right with broadcasters and other groups of music-users. How long before May 15th they had evidenced such an intention within a limited circle, I do not know. In addition, several other important houses (said

to include Feist, Mills, Marks, Fisher, Schirmer, Berlin and Robbins) were reported as indicating that they might follow the lead of the Warner Brothers group.

The Warner Brothers group controls a very large percentage of all music broadcast. They claim it is 40% of ASCAP music. The fact seems to be, however, that, in the case of the networks and the larger stations at least, the percentage was not more than about 20% of ASCAP music, while, in the case of smaller stations and particularly stations making a heavy use of phonograph records, the percentage is considerably higher. The other important houses who were considering withdrawal controlled, it is said, an additional 40% of ASCAP music. There was also a rumor that the Austrian and German societies might withdraw from ASCAP and follow the lead of SESAC as new and separate licensing pools.

Until about June 2, 1935, at least one of the networks had been negotiating for the purchase of the Warner Brothers group and perhaps others of the houses. On that date negotiations were broken off.

On June 24, 1935, the Warner Brothers group made public announcement of their withdrawal from ASCAP, effective December 31, 1935, and, in a letter to all stations, notified broadcasters that after that date all licenses for performing rights of their compositions must be obtained from them and that any infringement would be prosecuted.

Passing over relatively unimportant developments, we find that on November 26, 1935, the Warner Brothers group put all doubts at rest by issuing a public statement in which their resignation from ASCAP was announced and explained, principally on the ground of "insufficient and inadequate royalties collected by the society from radio broadcasters." It organized a corporation, known as Music Publishers Holding Corporation (MPHC) through which it proposed to issue licenses.

Prior to the morning of December 27, 1935, the Warner Brothers group had not, however, offered or submitted any definite proposal or formal contract to the NAB or, so far as we know, to broadcasters generally. There had been informal discussions earlier in December, but without result. It was known, however, that

(a) the Warner Brothers group was dissatisfied with the amount it has been receiving from ASCAP (\$340,000, which when combined with the like amount paid to the group's composers, made a total of \$680,000 out of a total of slightly under \$3,000,000 paid by broadcasters to ASCAP during 1935);

(b) that it was demanding a total of not less than \$2,000,000 (\$1,000,000 to the publishers and \$1,000,000 to the composers) or approximately three times as much as in the past;

(c) that it proposed to obtain this amount by (1) charging sustaining fees equal to 40% of those charged by ASCAP; (2) charging 2% of net receipts of the broadcasters, and (3) applying the 2% percentage to what it considered a hitherto untapped source of revenue, i. e., the revenue of networks as network (as distinguished from the network-owned or -controlled stations).



In the course of the NAB Board meeting December 9th to 17th, no action was taken with regard to the Warner Brothers group. The matter was one which was covered by the authority vested in me as Managing Director, by action taken by the Board December 17th, described under the preceding heading.

In the course of Friday morning, December 27th, a definite formal contract was presented by the Warner Brothers group for the first time.

The contract was immediately read over to the Advisory Committee. It was obvious from a single reading that its terms were not only exorbitant and objectionable, but, in certain respects, impossible to comply with. With the approval of the Advisory Committee, I wired the stations as follows:

"Am informed Warner Brothers contract mailed to all stations today stop Together with committee and attorneys have examined it and believe terms wholly unacceptable stop Am endeavoring negotiate modification of contract but there is chance negotiation will prove unsuccessful and that you should be prepared to face alternative of signing this contract or doing without Warner music January first stop Negotiations continuing on ASCAP contract stop Will keep you informed."

In the meantime a sub-committee was designated to study the contract and draw up a memorandum analyzing it and pointing out its objectionable features. This memorandum was completed in the course of the afternoon, and was mimeographed and mailed to stations with a covering letter signed by me as follows:

"Herewith enclosed is an analysis of proposed Warner Brothers contract. It has been prepared hurriedly. Some of the criticisms are of minor importance but on the whole it will be observed that the terms and conditions of the contract are entirely too severe. Conversations had this evening indicate that there is a possibility of meeting a few but not all the objections raised. The conversations will be pursued tomorrow."

The memorandum was used as the basis for conversations held that Friday evening with Mr. Herman Starr, executive in charge of the Warner Brothers group, and as the basis for negotiations conducted Saturday and Sunday with Mr. Starr and Mr. A. M. Wattenburg, general counsel for the group.

It is unnecessary to repeat what was set forth in that memorandum. It will be sufficient if attention is called simply to the amount and the basis for calculating compensation that would have been required under its terms. It would have required each licensee to pay 40% of the sustaining fee paid ASCAP and 2% of the licensee's net receipts (the term "net receipts" to include not merely the actual net receipts of the licensee but also, in the case of a network affiliate, the receipts of the network for the affiliate's facilities).

Starr appeared before us at about 8:00 p. m. Friday evening. The conference lasted until about midnight. He was adamant in refusing to modify his position with reference to the principal objections. He stated that the Warner Brothers group would not depart from its funda-

mental premise that the Warner Brothers group was entitled to a total of \$2,000,000 yearly for use of its music by broadcasters and evidenced no inclination to depart from the means, methods and percentages specified in the contract.

With reference to some of the minor objections, Starr was impressed with the arguments presented by us. He explained that he was not familiar with the practical side of broadcasting and that he was perfectly willing, with his attorney, to sit down with our group and attempt to improve mistakes that might have been made in the contract due to his lack of knowledge of the effect of its provisions on practical operations. This left, of course, only a very slender thread on which to pursue negotiations. We felt, however, that it was better to pursue this narrow thread for what it was worth than to abandon all hope of improving the terms of the first contract.

At this point, certain premises and assumptions on which we were in agreement should be set forth. They were as follows:

1. It would not be proper for the NAB, or for me as its Managing Director, to advise members of the NAB not to sign any contract with the Warner Brothers group or to dispense with Warner Brothers music, both for reasons hereinafter stated and because, taken in conjunction with the actions of the network and of ASCAP, such a procedure ran the risk of being held to be an illegal boycott.

2. A considerable number of broadcasters needed or wanted to use Warner Brothers music after December 31, 1935, and, if no other alternative were presented, many of them would sign the contract on the 40%-2% basis.


3. An even greater number of broadcasters, whether or not they needed or wanted to use Warner Brothers music, would be unable to avoid infringements and liability therefor at the rate of a minimum of \$250 per infringement. Their inability would proceed from insufficient facilities, records and staffs, from lack of any lists from either ASCAP or Warner, from the difficulty of controlling music played by remote control orchestras, etc.

4. For want of information and lack of opportunity for obtaining it, we were in no position to form any opinion on the merits of the issues in dispute between ASCAP and the Warner Brothers group as to control over the performing rights on a number of musical compositions. The course taken by the two national network companies, who had had much greater opportunity to look into the matter, was some indication that it would be extremely hazardous to broadcast any Warner music without a license from the Warner Brothers group.

During Saturday a sub-committee conferred with A. M. Wattenburg, general counsel for the Warner group, and later in the afternoon, with Wattenburg and Starr. Its starting point consisted merely in certain concessions which, as already stated, Starr had shown himself willing to make the evening before, having to do principally with requirements as to records and reports. The sub-committee, however, succeeded in re-opening the entire subject and by the end of the afternoon had made substantial progress. Among other things, Starr and Wattenburg began to appreciate more fully the justice of the broadcast-



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ers' claims that compensation should be based not on revenue but temporarily on card rates and eventually on a *per-piece* system; that broadcasters have a right to trustworthy lists of compositions controlled by the licensor; and that copyright should be cleared at the source, particularly in connection with network programs and electrical transcriptions. While no agreement was reached at this session, sufficient progress was made so that the sub-committee agreed to make calculations showing what revenue might be expected by Warner if compensation were based on card rates. The sub-committee returned to the hotel and made these calculations from the December issue of *Radio Advertising*, reducing their calculations to itemized statements showing the highest quarter-hour and the highest half-hour rates for each station in the United States; the deductions that would have to be made on a proportional basis for stations having less than full time; and the number of stations whose quarter-hour rate was \$18.00 or less. It proved impossible to use an hourly rate as a basis of calculations as so many stations do not publish such rates, and in fact the same was partially true of the one-half-hour rate. The sum total of the highest quarter-hour rates of all stations, thus calculated, came to slightly over \$23,000.

Up to this point, Warner had not receded from its demand that the total costs be \$2,000,000 annually from broadcasters. Obviously, to reach this amount it would be necessary for each station to pay a monthly compensation of approximately seven times its highest quarter-hour rate. This seemed impossible on its face and was very disheartening. The sub-committee, however, reported back to the full committee and in spite of the apparent obstacles it was agreed that the group was to continue the negotiations for the sake of whatever advantages might be secured.

Negotiations, therefore, were resumed early on the following day (Sunday, December 29). They were accompanied by discussions of all the other points raised and, in particular, discussion of the *per-piece* plan. Members of the full committee participated from time to time. Finally, by late in the afternoon, Starr agreed to reduce the basis for compensation for independently-owned stations from seven times the highest quarter-hour rate to four times the highest quarter-hour rate, the license to cover only non-network programs. It was apparent to all present that no further concession in total amount of compensation would be made. It was also apparent that, for lack of information on both sides, it would be impossible to put into effect immediately a *per-piece* plan although considerable consideration was given to working out a *per-piece* plan which would be based on the highest quarter-hour rate (that is, a certain percentage such as  $\frac{1}{2}$  of 1% of such rates for each piece broadcast). Because of this lack of information and because of the fact that the contract might serve as a precedent, Warner felt it would have to fix a fee *per-piece* that would be high enough to protect it in the future while the committee felt, for somewhat the same reasons, it must in-

sist on a fee sufficiently low to meet all situations. Both sides recognized that the matter needed further study. The result was that Warner chose the flat fee basis for its revised contract for a temporary period of three months, the flat fee being based on four times the highest quarter-hour rate and covering all non-network programs, and agreed to cooperate in working out a *per-piece* plan in that period.

By late Sunday afternoon when the committee was convinced that Warner would make no further concessions, Wattenburg proceeded with drafting the revised contract in the presence of the committee. During the course of revision a number of further points arose, some important and some not, but all of them entailing a certain amount of delay and discussion. It was not until well after midnight that the draft was completed and even then one or two points were left open in cases where the parties did not differ in principle but had not succeeded in finding the precise language which would be appropriate. These were settled early the following morning. Somewhere between 2 a. m. and 3 a. m., Monday morning, after conferring with members of the committee, I sent out the following telegram:

"Disregard Warner contract sent you this last week. Warner Brothers now offering revised three months' contract which will remedy many of objections pointed out by us and which in opinion of committee and myself will be substantially more favorable. Basis for compensation for full time station for all non-network programs is to be monthly payment of four times your highest quarter-hour rate. Other stations proportionally. Stations where highest quarter-hour rate less than \$18 basis of compensation not to exceed twice highest quarter-hour rate. Networks to have responsibility for clearing copyright on all network programs over their own stations, and over affiliate stations. Warner agrees to attempt to work out *per-piece* plan during contract period and to furnish complete catalogue by Feb. 1. Several other improvements in contract agreed to by Warner. Printed revised contract cannot be delivered to you for a day or two. If you desire to use Warner music after December 31 Warner assures me you can gain rights given by this contract by instructing me to accept in your behalf. Please wire immediately."

During Monday, December 30th, the revised contract was printed and by that evening it was on its way to most of the stations.

Space will not permit a detailed comparison of the provisions of the revised contract with those of the first contract. It will be helpful, however, to point out what progress was made with respect to the principal objections.

(a) *The amount of compensation.* Instead of asking for a total of \$2,000,000, the revised contract is based on asking a theoretical total of \$1,104,000 from all stations (including those owned and operated by the networks), for non-network programs. This sum represents 48 times the total of the highest quarter-hour rates of all stations. It must, however, be reduced by the amount of the concessions made by Warner to small stations and to stations

having various kinds of time limitations. For example, stations having quarter-hour rates less than \$18.00 were to pay only twice the highest quarter-hour rate monthly; since then Warner has made further concessions and raised the dividing line to \$25.00. Also since the network companies have not accepted Warner's contract, the total must be reduced by another very substantial sum, possibly in the neighborhood of 20%, assuming that all independently-owned stations accept the contract.

(b) *Method of calculating compensation.* As already noted, for the temporary period covered by the contract, the basis is a flat rate based on the highest quarter-hour rate. The contract recites the intention of the licensor to attempt to work out a *per-piece* plan. The principle of payment of copyright fees at the source is given complete recognition with respect to network programs and to some extent with reference to electrical transcriptions. Finally, very significant progress was achieved in the provision requiring Warner to furnish a complete list of its compositions not later than February 1, 1936.

(c) *The agreement to indemnify.* Only partial success was had under this heading. Warner did not agree to remove the limitation on the amount of guarantee, claiming that for a station having both ASCAP and Warner licenses no greater protection is necessary; its reason for this conclusion is that the only serious issue likely to arise on its music is ASCAP's claim to have the right to license performing rights on some of it and therefore the only thing likely to affect any station is that money paid to Warner should have been paid to ASCAP. Considerable progress was made through the inclusion of the item already mentioned; i.e., the furnishing of lists by February 1, 1936. In Starr's statement made public late in the afternoon of December 30th, the agreement of indemnity is given an entirely satisfactory construction in the following language:

"3. For the first time radio stations will be furnished with a complete catalogue of the compositions of which we warrant ourselves to be the owners."

(d) *Records and reports.* Under this heading the revised contract still calls for weekly reports of all compositions including those not controlled by licensor. This feature is objectionable. On the other hand, the requirements were considerably lightened with respect to reporting on compositions contained in network programs, electrical transcriptions, and phonograph records, so as to make compliance at least possible if not to relieve the burden.

Other improvements will be noted at several points in the revised contract in line with some of the suggestions made in the committee's memorandum drawn up on Friday, December 27th.

During Monday, December 30th, a large number of replies were received from stations to the telegram above quoted sent out early that morning. The same was true of days which followed. Many of the stations communicated by telephone. Without attempting to tabulate the results by days, it may be said that by the morning of January 1, 1936, the totals indicated that 154 stations were accepting the contract, 67 more were doing so tentatively, and 64 (in addition to the networks) had indi-

cated that they were not accepting the contracts. Most recent reports indicate that considerably over 200 stations have taken the contract.

In letters sent to their clients and agencies on December 24th, the two networks notified them that, effective December 31st, and until further notice, no music controlled by the Warner Brothers group would be performed. These letters set forth at length their reasons. They will be found reprinted in full in *Broadcasting*, January 1, 1936 (Vol. 10, No. 1), at page 7.

The developments beginning with Monday, December 30th, were complicated by telegrams sent by Gene Buck, President of ASCAP, to stations which had not yet agreed to a five-year extension, by the National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc., to all (or most) of their affiliated stations respectively; and by Leo J. Fitzpatrick, President of the NAB, to all member stations.

A copy of Buck's wire has been set forth under the preceding heading. The NBC wire was substantially as follows:

"We have had a number of telegraphic and telephone inquiries today asking our position in regard to a telegram received this morning by many associated stations from Mr. Baldwin regarding negotiations he has apparently had with Warner Brothers. Baldwin did not send us a copy of his message nor has he consulted us about it nor has the National Broadcasting Company agreed to any of the terms therein. National Broadcasting Company's position continues to be the same as outlined in Kobak's letter of December Twenty-third sent you by Brophy and accordingly National Broadcasting Company does not intend to schedule Warner publications on and after January First and will not agree to the terms outlined in Baldwin's telegram. We will continue with ASCAP catalogue on and after January First in accordance with my wire to you dated December Twenty-seventh quoting Mr. Burkan's letter."

The CBS wire was substantially as follows:

"For your information CBS is in no wise a party to the contract we understand is being offered to stations by Warner publishers group nor does any CBS owned station intend to take this contract stop On contrary we intend to abide by our decision to rely on ASCAP license but to play no Warner Brothers music until confused legal status is clarified stop Signing of Warner Brothers contract will not relieve you of obligation to pay copyright fees on local and network programs broadcast by you stop Printed list of Warner numbers mailed you today represents best information on what Warners claim to control but we are informed by ASCAP counsels that many compositions in list can be licensed only through ASCAP."

Mr. Fitzpatrick's wire was substantially as follows:

"In answer to numerous telegrams I feel I should clarify my position in the present copyright controversy stop As Vice-President of WJR Detroit and WGAR Cleveland I am not entirely in accord with the course pursued by the Managing Director of NAB stop In July of this year I renewed my present contract with ASCAP for period of five years and do not intend dividing the



industry by signing any other contracts stop I do not want this telegram to be construed as advising members as to what course to pursue but as one of the owners of two stations. I urge a united front."

Since January 1, 1936, the Warner Brothers group have instituted a large number of suits for infringement against the two networks (or their subsidiaries) and against a few independent stations not having Warner contracts. I am advised that in the case of the networks ASCAP is undertaking the defense of these cases; I do not know whether it intends to do the same for independent stations.

## VI. THE NAB THREE-POINT PROGRAM

Resolutions adopted at the St. Louis Convention in November, 1932, laid the basis for a three-point program of activity in the field of copyright. This program was formally adopted at an NAB Board meeting held April 5, 1933, as follows:

1. Immediate incorporation and establishment of the Radio Program Foundation.
2. Immediate steps toward litigation against ASCAP under the anti-trust laws.
3. The securing of remedial legislation to check ASCAP's activity.

A brief account of the progress made on each point of this program is helpful both because of the light it throws on the course of the negotiations and because of the assistance it may afford in determining NAB's future course of action.

*Radio Program Foundation.* In a general way, the idea of making public domain music available had been considered at meetings of the NAB Board and by the so-called Plenary Committee in the spring and summer of 1932. At the St. Louis Convention in November, 1932, Schuette strongly advocated the creation of an industry-owned radio music supply through a new corporation which would become a subsidiary of NAB, to rid the industry of its dependence upon ASCAP. He offered a resolution providing that a Radio Program Foundation, with a capitalization of about \$150,000, be subscribed by the industry. His resolution was referred to the NAB Board for consideration.

In a bulletin sent out to all stations on December 31, 1932, Schuette took an initial step to test out the plan. Two compositions published by a non-member of ASCAP were sent out to all stations for performance. Further steps of the same sort were taken at later dates, but none of them was attended by any great amount of success, primarily because of the quality of the music.

At the NAB Board meeting held in Washington, February 20-21, 1933, the proposal for a Radio Program Foundation was adopted, and a special committee was designated to carry forward the project. On February 23rd, Schuette sent out a bulletin describing the purposes of the Foundation.

On April 5th after negotiations with ASCAP were again broken off, it was decided to proceed immediately with the establishment. It was incorporated as a Delaware

corporation in the second week in April with Messrs. McCosker, Loucks, Hostetler, Schuette, and Flamm as its incorporators, and with Schuette as its operating head. Among others, its objectives were to establish relations with independent copyright owners and publishers and at once set up an organization competitive with ASCAP, to open up negotiations with certain other copyright pools probably along with certain foreign associations, and to explore public domain music.

Organization of the Radio Program Foundation was completed at a meeting of its Board of Trustees in New York, May 3, 1933. McCosker was elected chairman of the Board, Schuette president, Hostetler, secretary, and Loucks, treasurer. Schuette immediately began conferences with owners and their representatives owning titles not included in the ASCAP pool. Headquarters were opened in Washington.

On June 14, 1933, the Foundation secured the American radio rights to the catalogue of G. Ricordi & Co., of Milan, Italy, containing more than 123,000 numbers in all branches of music, including the hitherto restricted Puccini catalogue. Ricordi had, several years before, withdrawn its affiliation with ASCAP because of meager royalties. The Foundation offered the catalog to NAB members at monthly royalties ranging from \$2.50 to \$25.00, with higher fees for non-members. On network programs, the principle of clearing copyright at the source was given full recognition in these licenses. Licenses were offered to NBC and CBS and, if they were consummated, the Foundation was to pay additional sums to Ricordi, which arranged the transaction on a sliding scale providing for increased charges for network participation as well as for stations outside the NAB. After considerable delay, both networks took licenses. The amount of the license was calculated on a non-profit basis to the Foundation and NAB. It is true, of course, that a large portion of the Ricordi catalog was not protected by copyright in the United States, but it was also true that much of the catalog had already been recorded and had the advantage of being immediately available.

Shortly afterwards Schuette sent to all NAB members a compilation of records that are in the public domain.

At the Annual Convention held in Cincinnati September 16-18, 1934, a resolution offered by Schuette was adopted directing the NAB Board

"to organize a music pool, either by a reorganization of the Radio Program Foundation or otherwise for the purpose of obtaining for radio broadcasting stations the air rights to such music as may not otherwise be available or which may be made more readily available by such a pool, and to enlist the cooperation of all radio stations and their program departments in promoting the widest possible use of such music."

Unfortunately, the Foundation met with apathy on the part of the NAB Board, the networks, and the broadcasters generally. It was never adequately staffed with trained and experienced personnel. During 1934 and 1935 it was virtually dormant. By arrangement between Schuette and Ricordi, stations were permitted to renew



licenses directly with Ricordi. Finally, as of December 31, 1935, the corporation was formally dissolved.

*Anti-Trust Proceedings Against ASCAP.* Proceedings against ASCAP under the anti-trust laws were vigorously urged by Levy, WCAU, at the St. Louis Convention in November, 1932, in a plea based on his own experience.

With the breaking off of negotiations again with ASCAP on April 4, 1933, the institution of litigation became an active part of the NAB program.

On September 1, 1933, a test suit was filed against ASCAP in the Federal District Court for the Southern District of New York, in the name of Pennsylvania Broadcasting Company operating WIP, Philadelphia. The suit sought dissolution of ASCAP as an illegal combination in violation of the anti-trust laws, and asked that WIP's contract with ASCAP be declared void.

The WIP suit never came to trial, although it is at issue. With the filing of the Government suit against ASCAP, however, it was felt that every effort should be concentrated on assistance to the Government rather than on the private suit.

On August 30, 1934, in the same Federal District Court, the United States Government instituted suit under the Sherman anti-trust law asking dissolution of ASCAP, the Music Publishers Protective Association (which in March, 1933, had demanded a new rate of 25c per number of electrical transcriptions, instead of 2c per record), and the Music Dealers Service, Inc., naming approximately 125 officers and directors of the organizations, including Buck, Mills, Burkan and Paine.

By this suit the Government sought to establish a system of fees based upon the actual use made of public performance rights and to substitute competition among copyright owners for the monopolistic control exercised by ASCAP. It prayed that existing contracts of ASCAP with broadcasters and other users be declared invalid, as well as contracts between ASCAP and MPPA, and authors, composers and publishers. The suit asked that the defendants be restrained from entering into similar contracts; from joining similar firm, corporation, or society unless the facilities of such firm, association, corporation or society are open to every copyright owner on equal terms and unless license fees to be collected pursuant to licenses are determined by individual copyright owners for each musical composition owned by them; and from instituting infringement suits against any licensee upon the giving of bond by such licensee to insure payment of a reasonable charge as the court may determine or as may be arrived at between licensee and individual copyright owners. The Government's petition called attention to the

"distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 per cent by newspapers, and license agreements exacted from radio broadcasting stations not so owned"

and verbatim copies of the two types of license agreements were appended as exhibits.

The suit was filed just as the existing ASCAP license agreements with broadcasters were entering upon the

third year of their life, and the percentage on receipts to be paid by broadcasters was increased from 4% to 5%. While naturally the suit was more than welcome, and a great hope was aroused by its institution, it was obvious that only a miracle could bring about a successful termination of the suit in the lower court alone by September 1, 1935, when the contracts expired.

At the Annual Convention held in Cincinnati September 16-18, 1934, the NAB adopted a resolution instructing its officers and directors to support the Government suit.

An answer by the great majority of the defendants (83) was filed November 1st. It was a voluminous document of 42 pages and for the most part was a repetition of the story so often told by ASCAP at Congressional hearings, with which broadcasters are already familiar. The answer declared that a system of royalties based on actual use would be unworkable, and that broadcasters and other users were really seeking a situation under which they would pay nothing for copyrighted music. It alleged dire consequences if ASCAP were dissolved. It attempted to justify the favorable newspaper station contracts.

In the Government suit, a motion was made by the Government that a great deal of irrelevant matter be stricken from the defendant's answer. ASCAP moved that a commission be appointed by the Court to take testimony both in this country and abroad. The Court heard arguments on the motions January 11, 1935.

On March 26th, Federal Judge Knox granted the Government's motion to strip the case of irrelevant matter and denied ASCAP's motion which sought to delay the case by taking depositions all over the world. He left the way open, however, for ASCAP to reapply to take testimony on 3 or 4 relatively minor points, but only if exceptional reasons should be advanced. The Court's ruling was tantamount to a holding that the case was henceforth limited to the important issue of illegal price-fixing by ASCAP, and the way was open for expediting trial of the case.

On May 7th Andrew W. Bennett, special assistant to the Attorney General in charge of the Government suit, appeared before Judge Knox on a motion previously filed that the Court fix a definite early date for trial. He called the Court's attention to the widespread apprehension in the broadcast industry and elsewhere as to the demands that might be made by ASCAP at the expiration of existing contracts on September 1, 1935. Shortly afterwards the case was set down for trial June 10th and the Department of Justice proceeded to prepare for trial.

A further attempt by ASCAP to delay the case by a motion for postponement until fall was denied. On June 11th the case got under way before Federal Judge Goddard.

A half-dozen witnesses were heard in behalf of the Government and were subjected to lengthy cross-examination by Burkan, ASCAP counsel. On several occasions Burkan referred to the 5-year extensions secured by WCAU and the networks and asserted that there was no question of oppression or reasonableness in the charges

for music involved because several of the most important units of the industry had entered into 5-year extensions at a figure even higher than before. After less than two weeks, when it became obvious that the case could not be completed by July 1st, the Court adjourned the case until November 4th.

At the NAB Convention held at Colorado Springs, July 8-10, 1935, resolutions were adopted favoring and approving a continuation of the activities of the Attorney General and his staff in the Government suit against ASCAP, and instructing the officers and directors of the NAB to support the suit.

"to the end that royalties for the public performance of music may be determined by free and open competition among copyright owners."

On October 17, 1935, Government counsel conferred with ASCAP counsel and with the Court, and as a result the date of trial was again deferred from November 4, 1935, to January 6, 1936. This postponement was due primarily to delay on the part of counsel in agreeing on a stipulation of facts which the Court had asked them to prepare.

As a result of the public announcement of the withdrawal of the Warner Brothers group on November 26, 1935, trial was not resumed on January 6, 1936.

**Legislation.** Prior to September 1, 1932, there had, of course, been a great deal of important legislative activity which cannot be summarized here and which, in any event, did not result in any changes in the Copyright Act of 1909.

With the breaking off of negotiations again with ASCAP on April 4, 1933, remedial legislation again became an active part of the NAB program.

At the Annual NAB Convention held in Cincinnati September 16-18, 1934, a resolution was adopted petitioning Congress to amend the copyright law by omitting the language which fixes the minimum infringement penalty at \$250 and attorney's fees, leaving the court free, in each instance, to fix such penalty as in its discretion the court shall deem proper.

In January, 1935, a surprise move occurred in the form of an attempt to commit the United States to adherence to the International Copyright Convention. Technically this is not the correct title of the treaty (the Rome Revision of the Berne Berlin Convention for the Protection of Literary and Artistic Property) but it will be used for convenience. A bill to amend the Copyright Act of 1909, designed to lead to such adherence, was introduced with the sponsorship of the Department of State and had been referred, not to the Senate Committee on Patents, but to the Senate Committee on Foreign Relations. Due to vigilance on the part of Managing Director Loucks, a protest was filed in behalf of NAB and, in conjunction with protests filed by other organizations, caused the Senate Committee to refer the bill to the Department of State for the taking of further testimony.

The original bill already contained significant modifications of the existing law, some favorable and some un-

favorable to the broadcasting industry and other groups of users. Conferences were held before an Inter-Departmental Committee, with Mr. Wallace McClure of the Department of State as chairman. By March 28, 1935, the Committee was ready to submit a revised bill in which practically all the broadcasters' objections were met in a satisfactory manner. On April 1, the revised Bill (S. 3047) was introduced by Senator Duffy of Wisconsin and was referred to the Senate Committee on Patents.

Certain of the outstanding changes proposed by the bill were summarized by Managing Director Loucks in his report to the 1935 NAB Convention as follows:

- (1) the establishment of "automatic copyright" (i. e. copyright without the necessity for complying with any formalities), but with sharp limitations on the right of recovery of damages for infringement wherever registration and notice of copyright have not been had;
- (2) a material enlargement of the "writings" for which copyright may be secured, but no acceptance of the general European theory of "oral" copyright;
- (3) a considerable limitation of the right of injunction in cases where infringement of copyright is claimed;
- (4) the complete elimination of the fixed minimum statutory damage provision of the existing law, leaving the measure of damages in each case to be determined by the court;
- (5) the grouping together of all infringements by any one infringer up to the date of judgment, with the provision that any unauthorized network performance shall be regarded as the act of one infringer;
- (6) the reversal of the present law, as established in the Jewell-LaSalle case, by providing that there shall be no liability, civil or criminal, for the reception of any copyrighted work by the use of a radio receiving set, except where special admission fees are charged;
- (7) a provision regarding the "author's moral right," based on the very broad provisions of the Rome Convention but so modified as to give users considerable freedom in adapting copyright material for their special requirements.

Protection is given the copyright owner against unauthorized broadcasting of any copyrighted writing (including the reading of prose or poetry). The writings to which copyright protection is extended include

"Works prepared expressly for radio broadcasting, or for recording by means of electrical or mechanical transcription, including programs and continuities in so far as they embody original work of authorship."

The Senate Foreign Relations Committee had already voted to report favorably on the proposed ratification of the International Copyright Convention. On April 19, 1935, the Senate suddenly ratified the treaty. On April 22nd, the action was rescinded and, at the request of Senator Duffy and with unanimous consent, the measure was returned to the executive calendar.

On May 8th the Senate Patents Committee, in executive session, heard eight witnesses (including ASCAP representatives) who opposed certain phases of the Duffy Copyright Bill, as the bill was now called. The witnesses were given opportunity to submit briefs.



On June 17th the Bill (S. 3047) was favorably reported by the Senate Patents Committee. In the report Senator McAdoo, Chairman of the Committee, explained at length the elimination of the \$250 statutory minimum penalty for infringement, saying that the purpose of the amended provision is

"to accord a remedy for infringement, not a weapon under which the owners of copyright may stimulate the sale of their works."

At the NAB Convention held at Colorado Springs, July 8-10, 1935, a resolution was adopted petitioning Congress speedily to enact the Duffy Copyright Bill. On July 26th the Managing Director, jointly with officials of the Motion Picture Theatre Owners of America and the American Hotels Association, issued a statement asking passage of the bill.

On August 7, 1935, the Senate passed the bill. On August 12th it was referred to the House Committee on Patents, but Congress adjourned before any action was taken by the House Committee.

Since the convening of Congress on January 3, 1936, no progress has been made with the bill in the House. No hearings have been held and no date is set for hearings. My best information is that it will be at least several weeks before hearings are held and I believe that there is justification for the conclusion that ASCAP is at least partly responsible for causing this delay. The House Committee has, at present prospects, only one calendar day, early in March, and if hearings have not been held and if the bill is not reported by that date, the chance of its becoming law are very slight.

Another interesting development was the introduction on January 27, 1936, of H. R. 10632, by Mr. Daly of Pennsylvania. It also is a bill to amend the Copyright Act of 1909 and follows very closely the Duffy Copyright Bill. It restores, however, most of the objectionable features of the present law and of the original State Department bill, including the minimum statutory damages of \$250 for each infringement. It gives extensive copyright protection to phonograph records as such. This bill has also been referred to the House Committee on Patents.

## VII. CONCLUSIONS

To some extent this heading overlaps the next heading in which I set forth my recommendations, and it will not be necessary to enumerate certain conclusions which are implied in some of these recommendations. There are, however, certain conclusions to which separate attention should be called, even though some repetition is involved.

### A. Reason for Failure of ASCAP Negotiations

That the combined efforts of over 300 stations to negotiate an improved contract with ASCAP and to give effect to just principles of compensation endorsed by several successive NAB Conventions met with complete failure must, I think, be attributed to the following causes:

1. *ASCAP's monopolistic power.* Even with the withdrawal of the Warner Brothers group, ASCAP controls 60% to 70% of the music used by a large proportion of broadcasting stations. This music is, at least in the present state of affairs, indispensable to practically all stations, both because it is necessary to meet the needs and desires of the listening public and because it would be virtually impossible for a station to avoid innocent infringements, with their attendant heavy penalties. So long as this power exists, and no element of competition is introduced or enforced among the members of the ASCAP group, the broadcasting industry must expect to be at a heavy disadvantage in negotiating with ASCAP.

The principal weapons open to the broadcasting industry against this power are:

- (a) proceedings under the anti-trust laws, such as the pending Government suit and the pending WIP suit;
- (b) amendment of the copyright law, and
- (c) the marshalling of an independent source of supply of non-ASCAP music, so as to be able to operate broadcasting stations temporarily without ASCAP music and without danger of innocent infringement.

These are referred to again below.

2. *Defects in the copyright law.* While I am treating this as a separate factor, it is closely interwoven with the first factor. The defects in the existing copyright law, which have made it possible for ASCAP to have and to wield arbitrary monopolistic power, are

- (a) The provision imposing minimum statutory damages of \$250 for each infringement, no matter how innocent;
- (b) The interpretation given to the law by the courts that, in the case of a network program, for example, not only the originating station but every affiliate station broadcasting the program and every receiving set in a hotel public room, restaurant, or other public place of a commercial character is infringing; in other words, the failure to recognize the principle of clearing copyright at the source;
- (c) The failure of the law to make provision for obviously innocent and unavoidable infringement, such as a broadcast of a football game during which a college band plays a copyrighted song;
- (d) The failure of the law to impose suitable restrictions on combinations and pools of copyright owners.

3. *The lack of an independent supply of music.* This is sufficiently covered both above and under a later sub-heading.

4. *The discriminatory ASCAP contracts of the networks.* The networks are obviously ASCAP's largest individual customers. In turn, they are very important members of NAB and as such have regularly been represented on NAB's Board of Directors and, until the last few weeks, have played an important role in all NAB copyright activities, including negotiations with ASCAP.

By securing more favorable contracts from ASCAP in 1932 than were given the rest of the industry, they were placed in a position where their interests in copyright have proved to be opposed to the interests of independent

stations from a financial point of view (although not, I believe, from a sound, long-range point of view). They face a substantially increased financial burden for copyright licenses if any method of compensation, such as a per piece or measured service basis, is adopted, even though the total paid to ASCAP is no larger than before. This accounts, I believe, at least in large measure, for their opposition to the per-piece or measured service plan, for their attitude toward five-year extensions of ASCAP contracts, for their opposition to the Government suit, and perhaps other points in the policies followed by them.

The discriminatory ASCAP contracts are, in my opinion, the fundamental reason for the lack of a united front on copyright in the broadcasting industry today.

5. *The network-affiliate contracts.* The group of stations affiliated with the two national network companies is very large and constitutes a very important group. When they are forced to follow a certain course of action in copyright, it is almost inevitable that the remaining independent stations will be forced to do likewise.

No more effective weapon was placed in the hands of ASCAP than the provisions contained in the network-affiliate contracts requiring the affiliate to have ASCAP and other licenses. These provisions subjected the affiliate stations to the danger of heavy liability not only to ASCAP but also to the networks.

6. *Pressure exercised by the networks.* As I have already stated, a member of the NAB Board has been informed by ASCAP that their telegraphic demand for signed contracts was *at the insistence of both major networks*. Certain other circumstances tend to corroborate this. If this is true, the loss of the last opportunity for negotiations must be ascribed to the networks as well as to ASCAP.

## B. Prospect of Success in Future Negotiations with ASCAP

By success in future negotiations with ASCAP, I mean primarily, of course, the establishment of a sound basis for compensation, such as the per-piece or measured service plan, without any substantial increase in the amounts paid to ASCAP. I mean also the achievement of certain related objectives which need not be summarized here.

It is my conclusion that no important objective will be accomplished by more negotiations with ASCAP during the period covered by the five-year renewals. This conclusion is based on the following reasons:

1. The obstacles enumerated under the preceding subheading are still present, and unless removed they will continue to be present, and to block any progress by more negotiation.

2. By their conduct after the 1932 contracts had been forced on the broadcasting industry, Mills and other ASCAP representatives made it clear that, in spite of their oft-repeated protestations of willingness to negotiate, they were not willing to revise the contracts in any respect except on the basis of substantially increased compensation, and that their invitations to negotiate were inspired,

at least in part, by a desire to delay steps contemplated by the NAB or for other reasons to gain time. There is no reason to believe that any different tactics will be pursued during the next five years.

3. The only occasions in the past on which ASCAP has seemed really willing to negotiate have been when by reason of developments on other fronts the broadcasting industry seemed on its way toward achieving a measure of progress toward bargaining equality.

A corollary conclusion is that, to have any hope of success, the broadcasting industry must concentrate on removing so far as possible the obstacles which have been enumerated under the previous subheading. Such a program includes litigation, legislation, the establishment of an independent source of music supply, doing away with the discriminatory ASCAP contracts, eliminating the objectionable features from network-affiliate contracts, and any and all steps and proceedings necessary to these ends.

## C. The Music Publishers Holding Corporation

No one contemplates with pleasure the prospect of increased cost for music due to (a) ASCAP's refusal to reduce its fees to a degree corresponding to the recent diminution of its repertoire and (b) the necessity of having to deal separately with, and pay license fees to, the Warner Brothers group, represented by Music Publishers Holding Corporation.

On the other hand, for the first time in the history of the broadcasting industry, progress was made toward sound objectives in the negotiation of the revised MPHC contract. The favorable features of this contract have already been summarized. If the broadcasting industry will give its support and cooperation, still further progress has been promised by MPHC and will be achieved with the negotiation of a further contract at the expiration of the current 3-months' period expiring March 31, 1936. If, on the other hand, broadcasters join in any movement to boycott Warner music, or refuse to take MPHC licenses for any reason other than a bona fide lack of need for such licenses, any further progress will be seriously prejudiced.

It is my conclusion that, in the present state of the law and the actual condition of affairs, it is to the advantage of all users of music and of the public that the Warner Brothers group be maintained as a separate licensing organization, for the following reasons:

1. Some possibility of competition is opened up in a field in which ASCAP now enjoys a virtual monopoly.

2. Important progress may be made toward developing a per-piece or measured service plan of compensation, demonstrating its feasibility and advantages and serving as an example to ASCAP and other licensing pools.

3. An ASCAP victory over the Warner group, whereby the latter is forced back into ASCAP, would be disastrous in its effect on music publishers and composers generally and on any tendency or willingness among them to work toward a sound solution of the problem.



Needless to say, my conclusions are *not* reached with a view to assisting the Warner Brothers group as such, but solely and simply because of the reasons above set forth.

#### D. The Government Suit

As stated in the NAB Bulletin sent out January 13, 1936, the Government suit "is as important now as it has been at any time in the past and its prosecution should be pursued with vigor."

Certain considerations must, however, be frankly faced. Among them are the following:

1. The Government's suit was definitely weakened and prejudiced by the action of the networks and WCAU in obtaining five-year extensions on the eve of trial.

2. The situation presented by the Government's petition has been somewhat altered by the withdrawal of the Warner Brothers group, and the actions of ASCAP and the networks in connection therewith.

3. The discriminatory network contracts (which are not mentioned in the Government's petition) and the objectionable provisions in the network-affiliate contracts have assumed an importance to the issues raised by the suit, not heretofore apparent.

4. The forcing of independent stations to accept five-year extensions with a diminished repertoire, by January 15, 1936, raises issues that may be of importance to the successful prosecution of the suit.

5. The terms of the new contracts between ASCAP and its members are not known and may contain provisions pertinent to the case.

Because of these considerations, it is my conclusion that the Attorney General should be informed of all the developments covered by this report and should be urged to have an intensive study made of the suit in the light of possible new issues and new evidence. It may be that the Government's petition should be amended or that new or supplemental proceedings should be instituted, and it would be unfortunate if the pending suit should result unfavorably for want of the taking of proper steps at this time. This study should be made and concluded at the earliest possible date, after which the suit in its present or in modified form should be prosecuted with all vigor.

#### E. The Duffy Copyright Bill

It is my conviction that no effort should be spared in attempting to secure enactment of the Duffy Copyright Bill in the form in which it was passed by the Senate in August, 1935. This is not because the bill remedies all the injustices worked by the present law or because it is free from objectionable new features. Neither is true. It is because it goes far to remedy one defect in the present law which overshadows all others; it eliminates the minimum statutory damage of \$250 for each infringement, no matter how innocent, without which the arbitrary power of ASCAP to force unacceptable and unjust contracts on the broadcasting industry and on other groups of users of music would be greatly lessened.

Recent developments, however, force me to the conclusion that

- (1) without a determined effort on the part of the broadcasters and other groups of users, the Duffy Bill will not be passed by the House this session, or,

- (2) even if it reaches the state of being voted on by the House, there is serious danger that the \$250 minimum damage provision will be restored, and that only the utmost vigilance will prevent this.

If the bill is not passed this session, then the whole procedure must be recommenced, since the next session will be that of a new Congress. If this is so, then it is proper to consider whether the broadcasting industry should not then endeavor to secure a remedying of other defects in the present law not cured by the Duffy Bill. What I have in mind is that, after acquainting the Senate and House Patent Committees with the more recent developments and problems, we should ask definitely for provisions that would

- (1) render any licensing pool illegal unless it operates on a per-piece or measured service basis, is open on fair and equitable terms to all persons owning or controlling performing rights, and preserves competition between such persons, and

- (2) confine infringement suits, in the case of network programs, to the originating station.

#### F. An Independent Music Supply

It is my conclusion that the failure of the Radio Program Foundation to achieve the results expected of it is *not* due to any want of inherent merit in this part of the NAB program but rather (1) inadequate financing, (2) apathy on the part of the NAB, its directors and members and the networks, and (3) insufficient experienced personnel. There were, of course, minor defects and mistakes which, in my opinion, could all be remedied if another attempt is made.

It is my further conclusion that there is no more important feature of sound copyright program for the NAB than the establishing of an independent source of music supply such as was attempted in the Radio Program Foundation. This is not the place in which to present a detailed proposal; it should be made in a separate report confined to this one subject. Among the objectives to be accomplished by such an institution are the following:

1. The purchase, sales and licensing of performing rights.

2. The compilation and distribution of catalogs.

3. The collecting of information with respect to public domain music and, if necessary, the making of such music available.

4. The compilation and distribution of information regarding music (whether copyrighted, by whom controlled, and whether in the public domain) used in the manufacture of electrical transcriptions and phonograph records.

5. Entering into agreements with foreign copyright owners and licensing pools.

6. If necessary, the publication of music.

Not all these functions need necessarily be lodged in a separate corporation. Some of them (such as the distribution of catalogs) might well be considered to be more properly exercised directly by the NAB, through a copyright bureau.

There are, of course, problems with reference to the form of corporation, financing, the sale of stock, limitations on stock control, the profit or non-profit character of the enterprise, etc., which must be studied and in connection with which legal advice will be necessary. If the corporation is adequately financed and supported, none of those problems offers any serious difficulty.

#### G. The International Situation

On February 27, 1936, a meeting of the *Union Internationale de Radiodiffusion* (U. I. R.) opens in Paris, and during a week or more one of the principal subjects of debate will be copyright. The U. I. R. is composed of practically all the European broadcasting organizations and of many outside of Europe. In this country, the NAB is a member. The two networks and one independent clear channel station are the only members from the broadcasting industry. The copyright problems revolve mainly on the forthcoming international conference on copyright to take place next September, and have to do with proposals that the manufacturers of electrical transcriptions and phonograph records, as such, be given extensive copyright protection, and likewise that performing artists be given similar protection. These proposals are being vigorously urged and cannot be ignored.

If the United States should ultimately adhere to the Convention, it will be bound to give effect to its provisions in the law of this country. It is my conclusion that within practical limits, the NAB should do everything in its power to support the U. I. R. in the position it is taking in opposition to the proposals. It is also my conclusion that any adherence to the Convention by the United States should be postponed until after it is known what the provisions of the Convention are to be.

#### VIII. RECOMMENDATIONS

My recommendations must necessarily be somewhat in the alternative, depending on whether and how the Board of Directors chooses between the following courses of action:

1. To determine itself the copyright program for the NAB until the next Annual Convention, including the adoption or rejection of my recommendations hereinafter set forth,\* or
2. To call a special meeting of the NAB and to refer some or all of my recommendations to the membership for action, or
3. To refer this report with its conclusions and recommendations to the membership of the NAB, and to ask the members to determine whether a special meeting shall be called.

There is evidence of some sentiment in favor of a membership meeting at an early date but, without a poll of the members, I am unable to tell whether the sentiment

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is sufficiently widespread to justify the calling of such a meeting, with its attendant expense and inconvenience to the members. Under the By-Laws, a special meeting of the members may be called on 15 days' notice on request of either eight directors or of one-third of the members. The suggestion has been made that the date of the Annual Meeting be advanced to some date in the early future but I am inclined to believe that a special meeting would be preferable. A special meeting could be more easily confined to the pressing problems (principally in copyright), would be free of election turmoils, and would not be so likely to be interrupted by social functions.

I am not making any recommendations, therefore, as to whether a special meeting should or should not be called. Both the advantages and the disadvantages of such a course are more or less obvious and need not be recited. It seems to me that the answer to the question depends largely on whether the Board chooses to act on certain of the recommendations set forth below or to refer them to the members for discussion.

My recommendations are as follows:

#### Printing of the Report

1. That the Managing Director be authorized to print and distribute this report, together with a statement of the Board's actions thereon, to NAB members and to such other persons as in the judgment of the Managing Director have a legitimate interest therein.

#### Approval and Ratification of Actions of the Managing Director and the Advisory Committee

2. That the actions of the Managing Director and his Advisory Committee in the field of copyright since the December meeting of the Board of Directors be approved and ratified, both generally and particularly with respect to the following:

(a) Their attempts to negotiate a better license arrangement with ASCAP and their acceptance in the interim of a temporary arrangement cancellable on two days' notice.

(b) Their attempts to negotiate a better license agreement with Music Publishers' Holding Corporation and their actions in advising broadcasters of the improved terms of the revised contract and in acting as intermediary for stations desiring to accept said contract.

(c) Their adoption of the "Tentative Program of Activity in Behalf of the NAB," as contained in the printed NAB bulletin and issued January 13, 1936.

#### Policies with Respect to Copyright

3. That the resolutions adopted by the NAB at its 1935 and earlier Conventions, declaring in favor of the per-piece or measured service plan of compensation for performing rights be re-affirmed.

4. That all discriminations in ASCAP license agreements (as well as in the license agreements of any other copyright pool) be declared wrongful and against the best interests of the broadcasting industry and of the



public, including the discriminations involved in the network contracts, the newspaper-owned station contracts and the WCAU contract, and such discrimination should be done away with.

5. That those provisions in network-affiliate contracts requiring affiliate stations to have ASCAP or other licenses be declared to constitute an undue burden on affiliate stations, a serious obstacle to successful negotiations both in behalf of affiliate stations and of all other independent stations, and an unfair weapon in the hands of ASCAP and the networks, and such provisions should be eliminated from said contracts.

6. That, in the case of network programs, the NAB declare itself in favor of clearance of copyright at the source so that only the originating station will be held responsible for infringement and affiliate stations will be under no obligation to secure licenses with respect to such programs or to bear responsibility for any infringements that may occur therein.

7. That, generally, Part A of the above-mentioned "Tentative Program of Activity in Behalf of the NAB" be approved as a correct statement of the policies to be followed in negotiating license arrangements with ASCAP and other licensing pools.

8. That the action of ASCAP in refusing to reduce its fees by an amount corresponding to the diminution of its repertoire consequent on the withdrawal of the Warner Brothers group be declared to be arbitrary and unjust.

9. That the possibility of competition and of a sound basis for compensation offered by the withdrawal of the Warner Brothers group from ASCAP be declared, in the present state of the law and in view of the arbitrary power exercised by ASCAP, to be wholesome and in the interest of the broadcasting industry; that broadcasters be urged to do everything in their power to prevent a forcing of the Warner Brothers group to return to ASCAP, and that any attempt to refuse to deal with the Warner Brothers group for such purpose be condemned.

10. That the Officers and Directors of the NAB be authorized and instructed to take any and all necessary and proper steps to put the foregoing policies into effect.

#### The Government Suit

11. That the Managing Director be instructed to bring the contents of this report, together with any other facts pertinent thereto, to the attention of the Attorney General; to urge upon the Attorney General the imperative necessity for an immediate study of the Government suit against ASCAP and for a determination whether amendments or new or additional proceedings are necessary or advisable to attain the objectives sought to be accomplished by that suit; and to urge upon the Attorney General the imperative necessity for an early resumption of the prosecution of that suit either in its original or in amended or modified form.

#### The Duffy Copyright Bill

12. That the Managing Director be instructed to bend every effort to bring about enactment of the Duffy Copy-

right Bill (S. 3047) in the form in which it passed the Senate, and to oppose any attempt to insert or restore minimum statutory damages or penalties for infringement; and, if it should appear that enactment of the Bill in satisfactory form is impossible at this session, the Managing Director is further instructed to consider and to report back to the Board of Directors on the advisability of seeking further amendments to accomplish the following objectives:

(a) To render any licensing pool illegal unless it operates on a per-piece or measured service basis, is open on fair and equitable terms to all persons owning controlling performing rights, and preserves competition between such persons.

(b) To confine infringement suits, in the case of network programs, to the originating station.<sup>1</sup>

#### Radio Program Foundation

13. That the need for the immediate establishment of a corporation having substantially the same purposes and powers as the Radio Program Foundation be recognized, and that the Managing Director be instructed to prepare and submit to the Board at an early date a detailed plan and program for the establishment of such a corporation and its successful operation.

#### International Copyright Problems

14. That the importance of the copyright questions to be discussed at the U. I. R. Meeting to be held at Paris, beginning February 27, 1936, and to be determined at the Conference to be held at Brussels, beginning September 7, 1936, be recognized and that the Managing Director be instructed to take any steps that may be necessary to protect the interests of American broadcasters in the questions to be discussed and decided.

#### Assistance to the Managing Director

15. That the Managing Director be authorized to retain legal counsel and such other assistance as may in his judgment be necessary or advisable for the successful accomplishment of the objectives herein decided upon.

\* \* \*

In pursuing this or any other program it cannot be made too clear that it is in the best interest not only of the broadcasting industry but of the public that every encouragement be given to writers and composers of music, both for the sake of the advancement of their art as such and in order that a constant supply of music of the best quality be made available to listeners. To accomplish this, as I know is realized by the entire industry, no scheme will succeed that attempts to do anything less than compensate them, and compensate them generously for their work and their talent. It is not that the broadcasting industry desires, or ever has desired, to escape this obligation that it has engaged in its copyright activi-

<sup>1</sup> The Duffy Copyright Bill, in its present form, goes a long way towards, but still falls somewhat short of, accomplishing this objective.

ties but rather that it desires, and justly, that it be required to pay only for what it uses and that the fees paid by it actually reach those to whom they are due.

Respectfully submitted,

JAMES W. BALDWIN,  
*Managing Director.*

## RECORD OF BOARD ACTION

In acting on the above recommendations, the Board by majority vote adopted the following:

### Printing of the Report

1. That the Managing Director be authorized to print and distribute this report, together with a statement of the Board's actions thereon, to NAB members and to such other persons as in the judgment of the Managing Director have a legitimate interest therein.

### Approval and Ratification of Actions of the Managing Director and the Advisory Committee

2. That the actions of the Managing Director and his Advisory Committee in the field of copyright since the December meeting of the Board of Directors be approved and ratified, both generally and particularly with respect to the following:

(a) Their attempts to negotiate a better license arrangement with ASCAP and their acceptance in the interim of a temporary arrangement cancellable on two days' notice.

(b) Their attempts to negotiate a better license agreement with Music Publishers' Holding Corporation and their actions in advising broadcasters of the improved terms of the revised contract and in acting as intermediary for stations desiring to accept said contract.

(c) Their adoption of the "Tentative Program of Activity in Behalf of the NAB," as contained in the printed NAB Bulletin and issued January 13, 1936.

### Policies with Respect to Copyright

3. That the resolutions adopted by the NAB at its 1935 and earlier Conventions, declaring in favor of the per-piece or measured service plan of compensation for performing rights be reaffirmed.

4. That all discriminations in license agreements in respect of commercial stations be declared wrongful and against the best interests of the broadcasting industry and of the public, and such discriminations should be done away with. (Note: Specific references to actual existing discriminatory contracts were stricken from the recommendation as originally made.)

6. That, in the case of network programs, the NAB declare itself in favor of clearance of copyright at the source so that only the originating station will be held responsible for infringement and affiliate stations will be under no obligation to secure licenses with respect to such programs or to bear responsibility for any infringements that may occur therein.

8. That the action of ASCAP in refusing to reduce its fees by an amount corresponding to the diminution of its repertoire consequent on the withdrawal of the Warner Brothers group be declared to be arbitrary and unjust.

10. That the Officers and Directors of the NAB be authorized and instructed to take any and all necessary and proper steps to put the foregoing policies into effect.

### The Duffy Copyright Bill

12. That the Managing Director be instructed to bend every effort to bring about enactment of the Duffy Copyright Bill (S. 3047) in the form in which it passed the Senate, and to oppose any attempt to insert or restore minimum statutory damages or penalties for infringements; and, if it should appear that enactment of the bill in satisfactory form is impossible at this session, the Managing Director is further instructed to consider and to report back to the Board of Directors on the advisability of seeking further amendments to accomplish the following objectives:

(a) To render any licensing pool illegal unless it operates on a per-piece or measured service basis, is open on fair and equitable terms to all persons owning controlling performing rights, and preserves competition between such persons.

(b) To confine infringement suits, in the case of network programs, to the originating station.

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### International Copyright Problems

14. That the importance of the copyright questions to be discussed at the U. I. R. Meeting to be held at Paris, beginning February 27th, 1936, and to be determined at the conference to be held at Brussels, beginning September 7th, 1936, be recognized and that the Managing Director be instructed to take any steps that may be necessary to protect the interests of American broadcasters in the questions to be discussed and decided.

### Assistance to the Managing Director

15. That the Managing Director be authorized to retain legal counsel and such other assistance as may in his judgment be necessary or advisable for the successful accomplishment of the objectives herein decided upon.

The Board extended the authority given their Managing Director in December to select as Advisory Committee to confer and advise with him.



### Minority Report of Harry C. Butcher

I heard Jim Baldwin read the foregoing report at the Chicago Board meeting.

To attempt to answer or even to clarify a 21,000-word report covering several years of copyright history would require perhaps another 21,000 words. You would "tune-out" long before you got to me.

The apparent purpose of rehashing past history seems to be to make the networks the "goats." I notice particularly that the report disregards what to me is the unquestionable fact that all of the NAB copyright activities to date have resulted in increasing the cost of music to broadcasters generally and engendering bitterness among various groups of broadcasters.

Last summer after two years and a half of negotiation, the broadcasters had no idea on what terms they could renew their ASCAP licenses and they did not know whether they could renew for one year, or five, or ten, on any terms. It is perfectly true that the networks played a leading part in negotiating a new 5-year contract, enabling all broadcasters to go on without paying any more than they had been paying, with the sole exception of the networks themselves, who did consent—in order to get all broadcasters including themselves out of their difficulties—to pay substantially larger sustaining fees for their key stations. It is not the fault of the networks that many broadcasters were induced not to avail themselves of this opportunity.

But words, words and words—talk, talk and talk—are not what broadcasters want and need on copyright. They want action along constructive lines.

So I will content myself with a few observations—and the reiteration of a practical suggestion for constructive united action made at the Chicago meeting.

I have already said that I am not going to attempt to answer Jim Baldwin but I am tempted to hit a few of the high spots. On the authority of some anonymous informant in ASCAP, it is stated that the networks inspired or influenced the sending by ASCAP of the telegram which required all broadcasters to renew their contracts by January 15 of this year. That statement is untrue. Representatives of both networks were called into a meeting of the entire ASCAP Board on January 10 and the telegram was read to them and they were informed that it had already been sent. I have confirmed by numerous witnesses that this was the case and that the networks had no knowledge of the telegram in advance.

Jim Baldwin's report furthermore seems to me to be founded on basic misconceptions, the most important of which is that there is a fixed and definite amount of money to be paid for copyrights and that the question at issue is how much of that fixed amount the independent station should pay and how much the networks should pay. This is not the fact. All the copyright interests are unanimous in seeking larger and larger sums from all broadcasters, whether network or independent stations. Those who subscribe to this misconception have wittingly or unwittingly fallen for some of our opponent's

insidious propaganda which is intended to split the broadcasters and which, unfortunately, is showing rather ghastly success.

It also seems to me that undue stress is put on the fact that our network contracts require affiliated stations to have ASCAP licenses. This clause was put into contracts years ago for the protection of the local stations, ourselves and the clients of both. It is not practical to carry on network broadcasting without an ASCAP license. It is not practical to carry on network broadcasting without transmitters at local stations. But the local stations don't get indignant at us because they have to have transmitters.

Our contracts also recognize that affiliated stations must have licenses from the Federal Communications Commission and our mutual operations are based upon performance thereunder. If we were to remove the ASCAP clause from our contracts, would it lessen the local station's need for an ASCAP license any more than deletion of reference to the Government license in our contracts would lessen the local station's need of that license?

Furthermore, anyone who actually knows the temper and disposition of ASCAP is well aware that it would be utterly impossible to persuade ASCAP to allow local stations to go unlicensed. ASCAP on the contrary was utterly determined that there should be neither network broadcasting nor local broadcasting unless the stations were licensed for both. We don't control ASCAP. (We sometimes wish we did.)

Now, finally, for a constructive note. I find no mention in Mr. Baldwin's report or press release (in which he sums up the batting average of his own recommendations to the Board) of the most promising development at the Chicago meeting. I refer to a general agreement which was reached at the end of that meeting. This agreement was to the effect that the broadcasters, including the controlling and operating heads of the network companies, should sit down and try to put an end to the bickering and the name-calling, and see if together they could work out some constructive actions for and in behalf of all broadcasters. This suggestion, made by Ed Craig of WSM, Nashville, was endorsed by all who attended the Chicago meeting. The heads of my company stand willing to participate whole-heartedly in such a meeting. We are ready to support any fair and constructive measures which such a meeting may evolve. Such a meeting should consider among other things a practical plan for creating, financing and operating a music pool for all broadcasters. I urge that immediate action be taken to convene such a meeting. And until a program looking toward the future has been worked out, I deplore the issuance of statements and reports which serve only to split our own ranks to the advantage of our adversaries, and I suggest that until the results of such a meeting are made known, every broadcaster should preserve an open mind.

Respectfully submitted,

HARRY C. BUTCHER.

[fol. 311A]

## EXHIBIT TO AFFIDAVIT

Copyright Office of the United States of America,  
Washington, D. C.

I hereby certify that the following list shows the number of original and renewal registrations of copyright for musical compositions made from January 1, 1909 to December 31, 1936, inclusive by years:

## Copyright Registrations of Music List

Year	Published(1)	Unpublished (2)	Total	Renewals
1909-Jan. 1-June 30..	(2)	(2)	12561	.....
1909-July 1-Dec. 31..	9449	237	9686	157
1910.....	25838	1366	27204	667
1911.....	29113	1465	30578	546
1912.....	25729	932	26661	656
1913.....	25894	1395	27289	586
1914.....	24720	1532	26252	624
1915.....	18684	2382	21066	686
1916.....	16315	3658	19973	877
1917.....	15612	5376	20988	920
1918.....	18438	6362	24800	1031
1919.....	19333	7959	27292	853
1920.....	22849	8765	31614	1005
1921.....	21459	7472	28931	1244
1922.....	20084	7104	27188	1443
1923.....	18133	7339	25472	1769
1924.....	18639	8270	26909	1658
1925.....	18407	7746	26153	2235
1926.....	15829	8816	24645	2483
1927.....	18425	8022	26447	3185
1928.....	18487	8895	27383	3100
1929.....	16778	12642	29420	3654
1930.....	17272	16148	33420	4236
1931.....	14311	16596	30907	3453
1932.....	12411	15992	28403	3827
1933.....	11196	14796	25992	3958
1934.....	11213	16640	27853	5047
1935.....	11490	18192	29682	4933
1936.....	12317	21587	33904	5849
Total.....	508425	237686	758672	60682

## Notes:

(1) Includes an indeterminate number of published musical compositions also registered as unpublished under section 11 of the Copyright Act, as well as new arrangements of copyrighted works.

(2) Not recorded separately.

In Witness Whereof the seal of the Copyright Office has been affixed this tenth day of April, 1937.

C. L. Bowie, Register of Copyrights. (Seal.)

[fol. 312] IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF L. S. MITCHELL

L. S. Mitchell, being first duly sworn, deposes and says: that he is the manager of Radio Station WDAE, located in Tampa, Florida. That said Radio Station first commenced operations about 1923 and has continued in operation since that time; that said Station operates with a power of 5,000 Watts during the day time and 1,000 Watts at night pursuant to a license from the Federal Communication Commission. That the only other radio station located in Tampa is Station WFLA; that said Station WFLA operates with a power of 5,000 Watts during the day time and 1,000 watts at night pursuant to a license from the Federal Communication Commission.

That Radio Station WDAE caters to the same potential listening audience in and about the City of Tampa, Florida, as Radio Station WFLA; that Radio Station WFLA first commenced operations about 1925 and since that date Radio Station WDAE has been and continues to be in direct competition with said Radio Station WFLA in the sale of its broadcasting facilities to the radio advertising public located in the Tampa trade area.

That Radio Station WDAE has a license issued by the American Society of Composers, Authors and Publishers, one of the complainants in the above entitled suit, which authorizes such station to perform any and all of the musical compositions owned or controlled by any member of said Society, which license provides amongst other things that said Society in its discrimination and without any reason therefor may withdraw from public performance any copyrighted musical composition coming under the provisions of said license, that under the terms of said license Radio Station WDAE is obligated to pay to the said Society \$500.00 per year plus 3% of the first \$25,000.00 of income derived from the sale of broadcasting facilities for programs in which music controlled by said Society is rendered and 5% of the receipts from such sales in excess of \$25,000.00. Radio Station WDAE does not pay to the said Society any percentage of its income derived from programs which do not use music controlled by said

Society. A photostat copy of the license contract between Radio Station WDAE and the said Society, together with a photostat copy of the letter extending said agreement to December 31, 1940, is attached hereto and made a part hereof.

That on or about January 15, 1936, Radio Station WDAE was forced to accept the demands of the complainant Society and accept the extension of its license contract to December 31, 1940, without any reduction in the amount of the fee demanded by the Society although the music publishing subsidiaries of the Warner Brothers Picture Corporation had withdrawn from membership in the Society; that it is and has been impossible for Radio Station WDAE or any other broadcasting station to perform musical compositions without at some time performing compositions coming under the control of the said Society.

(Signed) L. S. Mitchell.

Sworn to and subscribed before me this 28th day of February, 1938. Virginia E. James, Notary Public, State of Florida at Large. My Commission expires Aug. 5, 1941. (Notarial Seal.)

[fol. 314]

#### EXHIBIT TO AFFIDAVIT

Operator's Broadcasting License for Newspaper-owner  
Station

No: —. Call: —

Memorandum of agreement between American Society of Composers, Authors and Publishers (Hereinafter Styled "Society"), and Tampa Publishing Company (hereinafter styled "Licensee"), conducting a radio broadcasting station 51% or more owned and operated by a daily newspaper as follows:

1. Society grants to Licensee, and Licensee accepts for a period of three (3) years from October 1, 1932, a license to publicly perform by broadcasting from Radio Station W. D. A. E. located at Tampa, Florida, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed



by members of Society, or of which Society shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant thereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license the performing rights hereinbefore granted, in programs rendered at [fol. 315] or from said radio station, or at or from any other place duly licensed by Society to perform such works (unless the performance originates at a place or from a source which Society does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that Licensee shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after Licensee shall have received notice from Society that such other places are not licensed by Society to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1,000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, Licensee shall promptly notify Society thereof, and either Society or Licensee may then terminate this agreement, and in such event Licensee shall be under no further liability to Society for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event Licensee shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. Licensee agrees upon request to furnish to Society during the term of the within license a list of all musical compositions (or, at the option of Licensee, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station; showing the title of each composition and the composer and/or author thereof; provided that Licensee shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by Licensee to Society shall be strictly confidential and Society covenants that it will make no disclosure thereof or of the contents thereof.

7. Society agrees during the term hereof to maintain for the service of Licensee substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society. Society reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions, and upon any such withdrawal, Licensee may immediately cancel the within agreement by giving written notice to Society of its election so to do.

In the event of any such cancellation by Licensee, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof,

or otherwise, Society shall refund to Licensee pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Society, as compensation for the within license, the sum of Five Hundred and 00/00 Dollars, (\$500.00) per annum payable in equal monthly installments [fol. 317] on or before the 10th of each month during the term hereof, plus, during each year of the term hereof, a sum equal to three per cent (3%) of the gross amount of receipts of Licensee from the sale of broadcasting facilities for programs in which music copyrighted or composed by members of Society is rendered, until such receipts shall have reached the total sum of Twenty Five Thousand and 00/00 (\$25,000.00) Dollars; and five per cent (5%) of all such receipts in excess of the foregoing amount.

It is, however, understood and agreed that in no event shall the total aggregate sum payable by Licensee to Society during any single year of the term hereof be less than Two Thousand and 00/100 (\$2,000.00) Dollars, and the deficit, if any, of such total aggregate sum in respect of any single year to the last stated amount shall be paid within thirty days of the receipt by Licensee from Society of a bill covering such deficit.

Provided, however, that gross receipts of the Licensee in respect of all commercial ("spot") announcements either interpolated between or preceding or following programs containing music copyrighted or composed by members of Society shall be subject to percentage payments as aforesaid. Public service announcements such as time announcements, weather and market reports, etc., shall be exempt from such percentage payments as shall also be broadcasts of political conventions, civic gatherings, parades, public functions and sports events, such as football and baseball games, as to music played thereat by bands attendant at such events. Nor shall any percentages be payable to Society in respect of service charges connected with the transmission of a non-commercial program from a remote control point to the studio of Licensee.

[fol. 318] Licensee shall render monthly statements to Society on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by Society and shall include in such statement all

gross receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station for programs wherein any music copyrighted or composed by members of Society shall have been included. Which said statement shall be rendered under oath and accompanied by the remittance due Society under the terms hereof. Any such statement may also include a deduction by or credit to the Licensee for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount". In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of Licensee on the monthly statement next succeeding the date of the actual collection.

9. Society shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of Licensee only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by Licensee.

It is understood and agreed that Society shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, Society may give Licensee ten (10) days notice in [fol. 319] writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said ten (10) days, Society may then forthwith cancel said license.

11. Society agrees to indemnify, save and hold Licensee harmless, and defend Licensee from and against any claim, demands or suits that may be made or brought against the Licensee with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in Society's repertoire heretofore or hereafter during the term hereof copyrighted or composed by members of Society.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee on account of any such matter as is hereinabove referred to, Licensee



shall forthwith give Society written notice thereof and simultaneously therewith deliver to Society any such notice, process, paper or pleading, or a copy thereof, and Society shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. Licensee, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for Society shall cooperate. Licensee shall cooperate with Society in every way in the defense of any such action or proceeding and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Society, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

[fols. 320-321] In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against Licensee, on account of the rendition of any musical composition contained in the Society's repertory but Not heretofore or hereafter during the term hereof copyrighted or composed by members of Society, Society agrees at the request of Licensee to cooperate with and assist Licensee in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. In the event of any change in the ownership or control of the said station whereby it becomes less than 51% directly owned and controlled by the Licensee, Society may, at its option, cancel and terminate this license upon 30 days' written notice.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

In Witness Whereof, this agreement has been duly subscribed by Society and Licensee this 8th day of October, 1932.

American Society of Composers, Authors and Publishers, by A. E. Arnold. Tampa Publishing Company, Licensee, by ———. (Seal.)

[fol. 322] American Society of Composers, Authors and  
Publishers,

Thirty Rockefeller Plaza,

New York City

January 15, 1936.

Tampa Publishing Company, Radio Station W.D.A.E.,  
Tampa, Florida

GENTLEMEN:

It is mutually agreed that the certain license agreement between us, dated October 8, 1932, effective October 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by [fol. 323] giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

Very truly yours, American Society of Composers,  
Authors and Publishers, by Herman Grunbery.

Accepted: Radio Station W.D.A.E., by David L. Smily,  
(Title) President.

Dated January 15, 1936.

[Title omitted]

AFFIDAVIT OF GILBERT FREEMAN

Gilbert Freeman being first duly sworn deposes and says:

That he is President of the Florida-Capitol Broadcasters, Inc., operator of radio station WTAL located in the city of Tallahassee, Florida; that he has examined the printed copy of the "Hearings before the Committee on Patents, House of Representatives, Seventy-first Congress, Second Session, on H. R. 9639, a Bill to Amend the Act entitled 'An Act to Amend and Consolidate the Acts Respecting Copyright,' approved March 4, 1909", conducted on March 4, and 5 and April 2, 1930; that the printed manuscript of said hearings bears the publication notice "United States Government Printing Office, Washington, 1930"; that the following extract is a true and complete copy of that portion of the [fol. 325] testimony or statement of Gene Buck, President of the American Society of Composers, Authors and Publishers, as it appears on page 5 of said official publication:

"In former times they have told you about the American Society—a terrific, monopolistic chimera that was just going to take the Victor Co. and the motion-picture industry right out of business. Let us put the cards on the table and see what the American Society is. *The American Society is an organization which consists of all the authors and composers, and their publishers in America* brought together because in the year 1914 my dear beloved friend, Victor Herbert, found that a restaurant on Broadway was taking one of the numbers from his opera, having a person in costume come out with an orchestra and sing his song without asking Herbert's permission, and making a covert charge."

That he has examined the printed copy of the "Hearings held before the Committee on Patents, House of Representatives, Seventy-Second Congress, First Session on H. R. 10976, a Bill to Amend and Consolidate the Acts Respecting Copyright and to Codify and Amend Common Law Rights of Authors in their Writings". That said hearings were held March 21, 24, 25, 1932 and that said printed manuscript of said hearings bears the publication notice "United States Government Printing Office, Washington 1932"; that the

following extract is a true and complete copy of that portion of the testimony or statement of Gené Buck, President of American Society of Composers, Authors and Publishers as it appears on page 213 of said official publication:

"Mr. Boland: The American Society of Composers, Authors and Publishers; I believe—I may be wrong—does not control much more than one-half of the popular music."

"The Chairman: Why, Mr. Buck told me they control 95 per cent."

"Mr. Buck: The copyrighted works."

[fol. 326] "The Chairman: Can you prove that to me?"

"Mr. Buck: Yes."

That he has examined the booklet entitled "How the Public Gets Its New Music" on the first page of which appears the name and official seal of the "American Society of Composers, Authors and Publishers, 1501 Broadway, New York, N. Y."; that the publication date shown on the second page of said booklet is "First Printing, April, 1933, Second Printing, May, 1933, Third Printing, August, 1934;" that the following extracts are true and accurate copies of portions of pages 3, 4, 7 and 25 respectively:

"The membership of the American Society of Composers, Authors and Publishers consists of 808 men and women, citizens of the United States of America, who are the creators of the bulk of the best music of all types originating in this country. The Society also represents more than 45,000 composers, authors and publishers of musical works scattered throughout sixteen foreign countries. The genius and skill of these people in the art of composing music and the industry of publishing it bring into existence the product which makes possible the operation of radio broadcasting as a popular entertainment medium and of nearly all commercial public amusement enterprises." (Page 3.)

"Music is an absolute essential to the successful commercial operation of a radio broadcasting station, a motion picture theatre, a cabaret, an amusement park, a dance hall and similar enterprises. As a supply of cotton is essential to the operation of a textile mill, or wheat to a flour-mill, so without music there would be no such thing as radio broadcasting as we know it nor would the commercial operation of thousands of places of public amusement be possible for



the entertainment of the millions of people who patronize them daily." (Page 4.)

"It is the ambition of the Society to encourage and support in a practical way the men and women of genius who write the music and songs of America because they are supplying in a constant and steady stream the flow of new music which is an absolute essential to the successful operation of nearly all public amusement enterprises." (Page 7.)

"Music is the 'raw Material' from which the radio industry makes its programs. Estimates of the use of music on the radio vary but it is generally conceded that 86 per [fol. 327] cent of the radio programs are made up of music. Not all of this music is owned by members of the Society, as much of it belongs to non-members and a considerable part of it is in the public domain, but generally speaking the major part of the music used is new, popular music, recently or currently written by the American Songwriting fraternity, most of whom belong to the Society." (Page 25.)

(Signed) Gilbert Freeman.

Subscribed and sworn to before me this 28 day of February, A. D. 1938. A. R. Mann, Notary Public, State of Florida at Large. My Commission expires May 6, 1940. (Notarial Seal.)

# IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF ROBT. M. TIGERT

On this day personally appeared before me, the undersigned authority, Robert M. Tigert, who being by me first duly sworn, deposes and says:

That he is the Manager of Radio Station WFOY operating at St. Augustine, Florida; that said Radio Station has a contract or license agreement with The American [fol. 328] Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all of said Society's members and of all members of foreign affiliations with such Society. That said agreement was entered into March 1st, 1937, and will expire three years and ten months

after date. Pursuant to said license agreement, the said Radio Station is obligated to pay to said Society the sum of \$100.00 per year plus 5% of its gross income. That the payments aforesaid are payable each month and that subsequent to June 9th, 1937, a check was forwarded by United States Mail each month for the months of June, July and August. Said checks were forwarded to said Society at its New York Office. That the envelopes containing said checks were returned unopened. That the sealed envelopes containing said checks have been kept by affiant for delivery to said Society at any time that the Society will accept same. That no other checks were forwarded to the Society in accordance with said agreement because affiant considered it would be futile acts. However, said Radio Station stands ready, willing and able to comply with its said contract in all respects, and that all of the payments due said Society are available for payment at any time that they will be accepted.

(Signed) Robert M. Tigert.

Subscribed and Sworn to before me, this 28th day of February, A. D. 1938. Josephine Versaggi, Notary Public, State of Florida at Large. My Commission expires Nov. 19, 1940. (Notarial Seal.)

[fol. 329] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF W. WRIGHT ESCH.

This day personally appeared before me the undersigned authority W. Wright Esch who, after being duly sworn deposes and says:

That he is the owner of Radio Station WMFJ operating at Daytona Beach, Florida; That said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, Authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to said Society the sum of \$250.00

per year, plus 15% of its gross income. That the payments aforesaid were made up to June 1st, 1937 after which date the said Society has refused to accept payments on said contract.

(Signed) W. Wright Esch.

Sworn to and subscribed before me this 26th day of February 1938. H. R. Scott, Notary Public, State of Florida at Large. My Commission expires January 30, 1942. (Notarial Seal.)

[fol. 330] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY G. WELLS, JR.

This day personally appeared before me the undersigned authority Henry G. Wells, Jr., who, after being duly sworn, deposes and says :-

That he is the General Manager of Radio Station, WCOA, operating at Pensacola Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members and of all members of foreign societies affiliated with said Society. That said license agreement was entered into April 20, 1933 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$400.00 per year, plus 5% of its net income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The [fol. 331] sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of

said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Henry S. Wells, Jr.

Sworn to and subscribed before me this 25 day of February, A. D. 1938. Phillip Sanchez, Notary Public. My Commission expires Feby. 8, 1941. (Notarial Seal.)

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IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFADAVIT OF BRADLEY SUDDUTH

This day personally appeared before me the undersigned authority Bradley Sudduth who, after being duly sworn, deposes and says:

[fol. 332] That he is the manager of Behmont & Gulf theatres, operating at Pensacola, Florida. That said theatres have a contract or license agreement with the American Society of Composers, Authors and Publishers, authorizing the public performance for profit at said theatres of the copyrighted musical compositions of all members of said Society and of all members of foreign societies affiliated with said Society. That subsequent to June 9, 1937, said Society has been refusing to accept checks in payment of the license fees provided for in the aforesaid license agreement; that said theatres are prepared to make the payments required by said contract and will make the said payments at any time the said Society will accept the amount provided for in said license agreement.

(Signed) Bradley Sudath.

Subscribed and sworn to, before me, this 25 day of February, 1938, A. D. Henry G. Wells, Notary Public, State of Florida at Large. My Commission expires April 21, 1940. (Notarial Seal.)



## IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF HAROLD H. MEYER

This day personally appeared before me the undersigned authority Harold H. Meyer who, after being duly sworn, deposes and says:

[fol. 333] That he is the manager of Radio Station WSUX, operating at St. Petersburg, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into January 1st, 1936 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937 a check for each monthly payment has been mailed to said Society at its New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed). Harold H. Meyer,

Sworn to and subscribed before me this 24th day of February 1938. Emma B. Miller, Notary Public, State of Florida at Large. My Commission Expires Jan. 20, 1940. (Notarial Seal.)

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD P. DANFORTH

This day personally appeared before me the undersigned authority Harold P. Danforth who, after being duly sworn, deposes and says:

That he is the Vice President & General Manager of Radio Station WDBO, at Orlando, Florida, operated by the Orlando Broadcasting Company, Inc.; that said Radio Station has a contract or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into January 20, 1936 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$600.00 per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment has been mailed to said [fol. 335] Society at its New York Office and has been returned unopened. The sealed envelope containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Harold P. Danforth.

Sworn to and subscribed before me this 24th day of February, A. D. 1938. Emily M. Beckett, Notary public, State of Florida at Large. My Commission expires Nov. 10, 1941. (Notarial Seal.)

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF W. WALTER TISON

This day personally appeared before me the undersigned authority W. Walter Tison, who, after being duly sworn, deposes and says:

[fol. 336] That he is the manager of Radio Station WFLA, operating at Tampa, Clearwater, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into Nov. 18, 1932 and extended on Jan. 15, 1930 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$— none per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937 a check for each monthly payment has been mailed to said Society at its New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time,

(Signed W. Walter Tison.)

Sworn to and subscribed before me this 24th day of February, 1938. C. O. Faircloth, Notary Public, State of Florida at Large. My Commission expires Nov. 6, 1938. (Notarial Seal.)

[fol. 337] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF L. S. MITCHELL

This day personally appeared before me the undersigned authority, L. S. Mitchell who, after being duly sworn, deposes and says:

That he is the manager of Radio Station WDAE, operating at Tampa, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into October 1st, 1932 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$500.00 per year, plus 3% on 1st \$25,000.00; 5% on all over \$25,000.00 of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937 a check for each monthly payment has been mailed to said Society at its [fol. 338] New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) L. S. Mitchell.

Sworn to and subscribed before me this 24th day of February 1938. Virginia L. Janes, Notary Public, State of Florida at Large. My Commission expires Aug. 5, 1941. (Notarial Seal.)



## IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF GEORGE H. MASON

This day personally appeared before me the undersigned authority George H. Mason who, after being duly sworn, [fol. 339] deposes and says:

That he is the Manager of Tampa Terrace hotel, operating at Tampa, Florida. That said hotel has a contract or license agreement with the American Society of Composers, Authors and Publishers, Authorizing the public performance for profit at said hotel of the copyrighted musical compositions of all members of said Society and of all members of foreign societies affiliated with said Society. That subsequent to June 9, 1937 said Society has not sent bills for payment of the license fees provided for in the aforesaid license agreement; that said hotel is prepared to make the payments required by said contract and will make the said payments at any time the said Society will accept the amount provided for in said license agreement.

(Signed) George H. Mason.

Subscribed and sworn to, before me, This 24th day of February, 1938 A. D. Virginia L. Janes, Notary Public, State of Florida at Large. My Commission expires Aug. 5, 1941. (Seal.)

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## AFFIDAVIT OF HAL I. LEYSHON

This day personally appeared before me the undersigned authority, Hal I. Leyshon, who, after being duly sworn, deposes and says:

[fol. 340] That he is the Vice-President of Radio Station WIOD, operating at Miami, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society mem-

bers, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into September 20, 1932 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of One Thousand (\$1,000) Dollars per year, plus five (5%) per cent of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Hal I. Leyshon.

Sworn to and subscribed before me this 25 day of February A. D. 1938. Martha Marsh, Notary Public, State of Florida at Large. My Commission Expires July 5, 1940. (Notarial Seal.)

[fol. 341] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### AFFIDAVIT OF J. F. SMILEY

This day personally appeared before me, the undersigned authority, J. F. Smiley, who after being duly sworn, deposes and says:

That he is the Manager of Radio Station WLAK, operating at Lakeland, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted

musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into May 1, 1936, and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$100.00 per year, plus 5 per cent of its net receipts. That the payments aforesaid are usually made each month and that subsequent to June 9, 1937, checks in payment of moneys due the Society under said Contract were mailed from month to month to the said Society at its New York office and the same returned unopened; that after [fol. 342] four of five of the envelopes, containing said payments, had been returned unopened, the said Radio Station has discontinued mailing further payments but monthly statements of amounts due the Society have been made each month under oath and are available at any time the Society will accept the same; that the envelopes containing said checks have been kept by the station and the station stands ready to deliver the same or make payment of same to the Society at any time the same will be accepted.

J. F. Smiley

Sworn to and subscribed before me this 24th day of February, A. D. 1938. Myrtle Barksdale, Notary Public. My commission expires Dec. 3, 1940.  
(Seal.)

[fol. 343] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GARLAND POWELL

This day personally appeared before me the undersigned authority, Garland Powell, who, after being duly sworn, deposes and says:

That he is the director of Radio Station WRUF, operating at Gainesville, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors, and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into October 3

1932, and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$ (none) per year, plus 5% of its gross income from advertising. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment for the months of June to November, 1937, inclusive, has been [fol. 344] mailed to said Society at its New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is and will continue to be available for the payment of the respective checks at any time.

Garland Powell.

Sworn to and subscribed before me this 26th day of February, 1938. Helen Watson, Notary Public, State of Florida at Large. My commission expires Nov. 11, 1939. (Seal.)

[fol. 345] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### AFFIDAVIT OF RUSSELL GILL

This day personally appeared before me the undersigned authority, Russell Gill, who, after being duly sworn, deposes and says:

That he is the Assistant Secretary of Pensacola Bridge Corporation operating Pensacola Beach Casino at Pensacola, Florida. That said Corporation has a contract or license agreement with the American Society of Composers, Authors and Publishers, authorizing the public performance for profit at Pensacola Beach Casino of the copyrighted



musical compositions of all members of said Society and of all members of foreign societies affiliated with said Society. That subsequent to June 9, 1937, said Society has been refusing to accept checks in payment of the license fees provided for in the aforesaid license agreement; that said corporation is prepared to make the payments required by said contract and will make the said payments at any time the said Society will accept the amount provided for in said license agreement.

Russell Gill, Assistant Secretary

Subscribed and sworn to, before me, this 25th day of February, 1938. H. M. Guenther, Notary Public, State of Florida at Large. My Commission expires Aug. 26, 1941. (Seal.)

[fol. 346] IN UNITED STATES DISTRICT COURT.

[Title omitted]

AFFIDAVIT OF F. W. BORTON

This day personally appeared before me the undersigned authority F. W. Borton who, after being duly sworn, deposes and says:

That he is the President of the Miami Broadcasting Company owner of Radio Station WQAM, operating at Miami, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into September 1st, 1932 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$1,000.00 per year, plus 3% of its gross income. That the payments aforesaid are made each month and that [fol. 347] subsequent to June 9, 1937, a check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the

Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

Miami Broadcasting Company, (Signed) F. W. Borton, President. (Seal.)

Sworn to and subscribed before me this 25th day of February A. D. 1938. (Signed) Marion Crutchfield, Notary Public, State of Florida at Large. My Commission Expires Dec. 13th, 1941. (Seal.)

[fol. 348] IN UNITED STATES DISTRICT COURT

{Title omitted}

**AFFIDAVIT OF GLENN MARSHALL, JR.**

This day personally appeared before me the undersigned authority Glenn Marshall, Jr. who, after being duly sworn, deposes and says:

That he is the Sec'y & Treasurer of Radio Station WMBR, operating at Jacksonville, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into January 1, 1936 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$500.00 per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a [fol. 349] check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have

been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is; and will continue to be available for the payment of the respective checks at any time.

(Signed) Glenn Marshall, Jr.

Sworn to and subscribed before me this 24 day of February A. D. 1938. Paul G. Baxter, Notary Public, State of Florida at Large. My Commission expires Jan. 21, 1939. (Notarial Seal.)

[fol. 350] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### AFFIDAVIT OF GILBERT FREEMAN

This day personally appeared before me the undersigned authority, Gilbert Freeman, who, after being duly sworn, deposes and says:

That he is President of Florida Broadcasters, Inc., operating Radio Station WTAL at Tallahassee, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members and of all members of foreign societies affiliated with said Society that said agreement was entered into August 20, 1935 and is to expire December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to said Society the sum of One Hundred Dollars (\$100.00) per year plus five per cent (5%) of its gross income that the payments aforesaid are to be made monthly.

Since June 9, 1937, the said Society has declined to receive through the mails monthly payments for said service and

has returned unopened all checks and correspondence from the said Radio Station to the said Society. The said Radio [fol. 351] Station has the money in the bank to pay all checks, accounts or moneys due the said Society under the said license agreement whenever said Society will accept same and said moneys will continue to be available for the payment of all checks, accounts, or moneys due said Society.

(Signed) Gilbert Freeman.

Sworn to and subscribed before me this 28th day of February A. D. 1938. A. R. Mann, Notary Public, State of Florida at Large. My Commission Expires May 6, 1940. (Notarial Seal.)

[fol. 352] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE A. HAZLEWOOD

This day personally appeared before me the undersigned, author ty George A. Hazlewood who, after being duly sworn, deposés and says:

That he is the Vice President and General Manager of Radio Station WJNO, operating at West Palm Beach, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into August First, 1936 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$100.00 per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly [fol. 353] payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will



continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Geo. A. Hazlewood.

Sworn to and subscribed before me this 25th day of February A. D. 1938. William A. Cobb, Jr., Notary Public. Com. Expires 8/1/1939. (Notarial Seal.)

[fol. 354] IN UNITED STATES DISTRICT COURT IN AND FOR THE  
NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, etc., et  
al., Complainants,

vs.

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, et al., Defendants.

MEMORANDUM OPINION—Filed April 5, 1938

PER CURIAM:

The Complainants, American Society of Composers, Authors and Publishers, an unincorporated association organized and existing under the laws of the State of New York. Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others filed their bill of complaint on the 7th day of February 1938 against the Attorney General of the State of Florida and a number of State Attorneys, in which bill it is sought to enjoin the defendants from enforcing the provisions of an Act of the Florida Legislature passed during the Session of 1937, which law declares any combination of persons. [fol. 355] firms, or corporations which determine the amount of money to be paid to it or to its members for the purpose of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions when such com-

bination is composed of a substantial number of all musical composers, copyright owners or their heirs, successors or assigns, to be an unlawful monopoly and its purpose would be in restraint of trade. It makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization either in Florida or elsewhere if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Florida, for the purpose of preventing free competition between different copyright owners. There are penalty provisions applying where any attempt is made to collect license fees by the owners of copyright and requiring authors, composers and publishers to specify on any published musical composition prepared for use in Florida the selling price of such composition. Other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the State of Florida.

[fol. 356] The bill alleges that the enforcement of this Act will violate rights granted to them by the copyright Act of Congress; that it is in violation of the Federal Constitution and impairs the terms of certain existing contracts held by these plaintiffs.

The cause is before this Court upon application for interlocutory injunction; upon the bill of complaint, affidavits filed therewith and upon motion to dismiss the bill of complaint.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act to the irreparable injury of plaintiffs unless such injunction order is issued.

It appearing to the Court that plaintiffs have shown that great damage will be inflicted upon them if preliminary injunction is not granted, and that there is grave doubt of the constitutionality of the Act;

It is considered by the Court that an order be entered granting such interlocutory injunction and that the motion to dismiss the bill be denied.

Rufus E. Foster, Circuit Judge. Louie W. Strum, District Judge. A. V. Long, District Judge.

[fol. 357] IN UNITED STATES DISTRICT COURT IN AND FOR THE  
NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, etc., et  
al., Complainants,

vs.

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, et al., Defendants

ORDER GRANTING MOTION FOR INTERLOCUTORY INJUNCTION,  
ETC.—Filed April 5, 1938.

This cause coming on to be heard and the same having  
been argued by Counsel for the respective parties, and the  
Court having inspected the record and the briefs filed:

It is ordered:

1st. That the application for interlocutory injunction be  
and the same is granted.

2nd. That the defendants, Cary D. Landis, individually  
and as Attorney General for the State of Florida; E. Dixie  
Beggs, Jr., individually and as State Attorney for the First  
Judicial Circuit of Florida; O. C. Parker, Jr., individually  
[fol. 358] and as State Attorney for the Second Judicial  
Circuit of Florida; A. K. Black, individually and as State  
Attorney for the Third Judicial Circuit of Florida; Wil-  
liams A. Hallows, III., individually and as State Attorney  
for the Fourth Judicial Circuit of Florida; J. W. Hunter,  
individually and as State Attorney for the Fifth Judicial  
Circuit of Florida; Chester B. McMullen, individually and  
as State Attorney for the Sixth Judicial Circuit of Florida;  
Murray Sams, individually and as State Attorney for the  
Seventh Judicial Circuit of Florida; J. C. Adkins, indi-  
vidually and as State Attorney for the Eighth Judicial Cir-  
cuit of Florida; Murray W. Overstreet, individually and as  
State Attorney for the Ninth Judicial Circuit of Florida;  
L. Grady Burton, individually and as State Attorney for  
the Tenth Judicial Circuit of Florida; G. A. Worley, indi-  
vidually and as State Attorney for the Eleventh Judicial  
Circuit of Florida; Roy D. Stubbs, individually and as State  
Attorney for the Twelfth Judicial Circuit of Florida; J.  
Rex Farrior, individually and as State Attorney for the

Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; and each of them individually and in their respective capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained until the further order [fol. 359] of this Court from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3rd. That the motion made by the defendants to dismiss the bill of complaint be and the same is denied.

[fols. 360-364] 4th. That the defendants be given thirty (30) days from the date hereof to answer.

This order is made conditional upon the plaintiffs filing herein within thirty (30) days a bond in the sum of five thousand (\$5,000.00) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order; said bond to be approved by the Clerk of the United States Court for the Northern District of Florida.

Done and ordered this the 4 day of April, A. D. 1938.

Rufus E. Foster, Circuit Judge. Louie W. Strum,  
District Judge. A. V. Long, District Judge.



[fol. 365] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 25, 1938.

Come now the defendants in the above entitled cause and file the following assignments of error upon which they will rely in the prosecution of the appeal from the interlocutory order granting temporary injunction made and entered in this cause on the 4th day of April, A. D. 1938, and say that the Court erred in the following respects, to-wit:

First Assignment of Error

The Court erred in taking jurisdiction of the cause for any purpose other than to dismiss the bill of complaint for want of jurisdiction as a Federal Court.

Second Assignment of Error

The Court erred in denying the defendants' Motion to Dismiss the Bill of Complaint.

[fol. 366] Third Assignment of Error

The Court erred in denying defendants' Motion to Dismiss the Bill of Complaint for want of jurisdiction as a Federal Court.

Fourth Assignment of Error

The Court erred in denying defendants' Motion to Dismiss the Bill of Complaint for want of jurisdiction as a Court of Equity.

Fifth Assignment of Error

The Court erred in denying defendants' Motion to Dismiss the Bill of Complaint on the ground that Chapter 17807, Laws of Florida, 1937, is a valid statutory enactment.

Sixth Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937.

### Seventh Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937, without stating its finding of fact and conclusions of law as required by Federal Equity Rule 701, as amended. (\*)—See below.

### Eighth Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937, without determining that the unconstitutionality of said statute was reasonably free from doubt.

[fol. 367]

### Ninth Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937, in that the granting of such temporary injunction was an abuse of discretion.

### Tenth Assignment of Error

The Court erred in not finding and holding that the defendants were only charged with the duty of enforcing Section 1 of Chapter 17807, Laws of Florida, 1937, and the sections dependent thereon, viz.: Sections 3, 4-A, 4-B, 5-A, 5-B, 6-A, 7-B, 8, 9; that said sections are valid enactments under the police powers of the State of Florida, and that the remaining sections of said Act are without the scope of this suit.

(Signed) Cary D. Landis, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Andrew W. Bennett; Lucien H. Boggs, Solicitors for Defendants.

(\*)—"At the time of filing this Assignment of Errors, as required by Rule 9 of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 701, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein."

[fol. 368-410] IN UNITED STATES DISTRICT COURT

[Title omitted]

## ORDER ALLOWING APPEAL—Filed April 25, 1938

This day came the plaintiffs by their solicitors, and having filed and presented to the Court their petition for the allowance of any appeal to the Supreme Court of the United States, together with their assignment of errors and a statement of basis of appellate jurisdiction pursuant to Rule 12 of said Supreme Court, and it appearing that an appeal to the Supreme Court of the United States is allowable under United States Code Title 28, section 380:

It is Hereby Ordered that said appeal be allowed upon the filing of a bond in the sum of \$500.00, with good and sufficient surety to be approved by the Court.

Dated at Gainesville, Florida, this 25 day of April 1938.

(Signed) A. V. Long, District Judge.

[fol. 411] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 412] NOTICE OF HEARING—Filed March 1, 1938

To Fred Cone, as Governor of the State of Florida, Carl D. Landis, individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida, O. C. Parker, Jr., individually, and as State Attorney for the Second Judicial Circuit of Florida, A. K. Black, individually, and as State Attorney for the Third Judicial Circuit of Florida, William A. Hallows, III, individually and as State Attorney for the Fourth Judicial Circuit of Florida, J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida, Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida, J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida, Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Circuit of Florida, L. Grady Burton, individually.

and as State Attorney for the Tenth Judicial Circuit of Florida, G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida, Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida, J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida, John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida, Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida:

[fol. 413] You and each of you are hereby notified that the complainants in the above entitled cause, did, on the 7th day of February, 1938 file in the above entitled Court at Gainesville, Florida, a Bill of Complaint supported by the affidavit of Gene Buck annexed thereto, which said complaint prayed for a temporary and permanent injunction restraining the defendants and each of the defendants in the above entitled cause from bringing directly or indirectly or permitting to be brought directly or indirectly any proceeding at law or in equity for the purpose of enforcing Senate Bill No. 679 of the State of Florida, enacted by the Legislature of the State of Florida in its Regular Session held in the year 1937, approved by the Governor of the State of Florida on June 9, 1937 and filed in the office of the Secretary of State of the State of Florida, on June 10, 1937, relating to the use of copyrighted songs and music, against the complainants or any of them or against other similarly situated, and that the complainants heretofore moved the Court for a temporary injunction in the form of an interlocutory decree and requested that the same be held and determined by three Judges, as provided by Section 380, Title 28 of the United States Code Annotated as amended.

You and each of you are further notified that the Honorable Rufus E. Foster, one of the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, and the Honorable Augustus V. Long, one of the Judges of the United States District Court for the Northern District of Florida, and the Honorable Louis W. Strum, one of the [fol. 414] Judges of the United States District Court for the Southern District of Florida, heretofore made an order setting the complainants' application for a temporary injunction in said cause for hearing before the Court at the Court Room in the Federal Building in the City of New



Orleans, Louisiana on the 3rd day of March, 1938, at 10:00 o'clock in the forenoon of that day before the three Judges hereinbefore named.

You are further notified that the said hearing before the said three Judges will be held on the 3rd day of March, 1938 at 10 o'clock in the forenoon of that day in the Federal Building at New Orleans, Louisiana, as provided in said order, and that the same will be heard upon the Bill of Complaint, the Motion for a Temporary Injunction and the Affidavits of Gene Buck, Walter S. Fisher, Saul H. Bornstein, Gustave Schirmer, Anne Paul Nevin, Deems Taylor and Ella Herbert Bartlett, heretofore filed herein, and such other proof as may be submitted at such hearing in accordance with said order and the determination of the Court.

Dated, this 19th day of February, 1938.

(Signed) Wideman, Wardlaw & Caldwell, Attorneys  
for Complainants.

Received a copy of the above and foregoing notice this 21st day of February, A. D. 1938.

Fred P. Cone, as Governor of the State of Florida.

Received a copy of the above and foregoing notice this — day of February, A. D. 1938.

—, Individually and as Attorney General of  
the State of Florida.

[fols. 415-419] Bond on injunction for \$5,000.00, approved and filed April 13, 1938, omitted in printing.

[fols. 420-421], Notice of injunction order and filing of bond with proof of service thereof, filed April 18, 1938, omitted in printing.

[fol. 422] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 17,  
1938

This suit having been duly commenced on February 7th, 1938, by filing a subpoena and bill of complaint in this Court

and service of copies thereof having been made upon all the defendants (except "John Doe" and "Richard Roe"), and the complainants having moved for a temporary injunction, and due notice of said motion having been made upon the defendants herein as well as upon the Governor and Attorney General of the State of Florida, and the defendants, State Attorneys, having appeared herein generally (with the exception of the defendants "John Doe" and "Richard Roe"), and the defendants having duly moved to dismiss the complaint and to deny the motion for temporary injunction; and all of said motions having duly come on for argument and having been heard on March 3rd, 1938, at the Federal Courthouse in New Orleans, Louisiana, this Court hereby makes the following findings of fact and conclusions of law.

[fol. 423]

### Findings of Fact

1. At the 1937 Session of the Legislature of Florida there was passed by said Legislature a Bill designated as Chapter 17807, Senate Bill No. 679, and said Bill was signed by the Governor of that State on June 9th, 1937, and made effective immediately. Said statute is referred to as the "State Statute" hereinafter; a copy is hereto annexed.

2. The complainant American Society of Composers, Authors and Publishers (hereinafter referred to throughout these findings as the "Society") was at all the times hereinafter mentioned and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City and State of New York, in the Southern District of New York. The membership of the Society constitutes a substantial number of persons, firms and corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, to-wit: a membership of one thousand, consisting of authors, composers and publishers of musical works; said Society has contracts now valid and subsisting between it and similar societies situated in the countries of the civilized world, which foreign societies have a membership of approximately forty-four thousand and under which contracts the Society licensed to users of music within the United States, including the State of Florida, until the enactment of the State Statute hereinafter mentioned, the

right to publicly perform for profit all of the copyrighted musical compositions controlled by said foreign societies, as well as by the Society.

3. All of the complainants are citizens of the United States and residents of the State of New York, except complainant, Anne Paul Nevin, who is a resident of the State of Maine; and the defendants are citizens and residents of the State of Florida, and officers of the State of Florida, duly elected, appointed and qualified, empowered, directed [fol. 424] and charged by the said state statute with the duty of enforcing the criminal and civil provisions thereof.

4. This action is a suit in equity arising under the Constitution and laws of the United States and the matter in controversy exceeds \$3,000 exclusive of interest and costs.

5. Under mutual working arrangements with societies in the foreign countries, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performances for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the rights vested in such foreign societies with respect to the licensing of their performing rights in the United States are not conditioned upon and are entirely independent from the sale of copies of sheet music and the price fixed therefor. The right to perform the musical compositions embraced in the catalogues of such foreign societies are included in the blanket licenses issued to individual licensees by the Society in the United States. Such foreign societies represent 44,000 members who are scattered throughout the world; they are not required to file copies of their respective musical compositions in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid.

6. Because of the provisions of Section 1 (e) of the Copyright Act of 1909, as amended, under which any manufacturer of parts of instruments serving to repro-

duce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions without the express consent of the copyright proprietors, including complainants. The copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electrical transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public performance for profit thereof.

7. Complainants will be able to license users of their music in the State of Florida without doing any act in said State, but unless the injunction prayed for is granted, complainants will be unable to issue any licenses from without the State of Florida without incurring the penalties of said [fol. 426] State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies are being, and have been constantly performed in the State of Florida and each and every county and district therein, and will continue to be performed therein.

8. Said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted



works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books, and periodicals, none of which are affected by the said State Statute.

9. Said State Statute attempts to vest in the courts of Florida the rights to determine the ownership of complainants' copyrights without properly securing jurisdiction over complainants, who are not residents or domiciled within the State of Florida, and are not doing business therein, and who have no agency within said State and have no property within said State which has a situs.

10. Said State Statute is in its terms so drastic and the penalties attached to the violation of the terms thereof are so great that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without such State if the public performance for profit of such music may be reproduced or performed within such State. There are fourteen judicial circuits in the State of Florida, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, and the foreign societies with which the Society has reciprocal arrangements; and if complainants attempt to issue licenses or collect from licensees or [fol. 427] attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions and unless defendants are restrained complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers, radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by any other means of rendition whatsoever within the State of Florida from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in such State; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of such State; complainants and

others similarly situated, as well as the Society, were compelled from the effective date of the State Statute, until the date of the granting of temporary injunction, herein, to desist from licensing the public performance for profit of their copyrighted musical compositions in such State and were deprived during such period of all sources of revenue therefrom, and were denied the privileges granted to them by the Copyright Act; and the Society was compelled to desist from enforcing collection of payments under existing contracts between it and users during such period and was denied liberty of contract and was compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions; and complainants would continue to suffer as aforesaid but for the granting of the injunction herein; and complainants and [fol. 428] the Society and its affiliated societies, were hindered, delayed and impeded in enforcing their rights and remedies under the Copyright Act in the Federal Courts located in the State of Florida for infringements committed by users within such State by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated were unable to detect and sue for infringement of their copyrighted musical works within the State of Florida during such period.

11. Complaints have no adequate remedy at law and are relievable only in this Court of Equity, and if complainants were not afforded the equitable relief prayed for herein but were required to resist criminal prosecutions and other suits or proceedings instituted under the State Statute, it would result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

[fol. 429]

#### Conclusions of Law

I. The bill of complaint states facts sufficient to constitute a cause of action against each and every one of the defendants.

II. The State Statute is not a reasonable exercise of the police power of the State of Florida, and the penalties and confiscatory provisions provided for therein are not reasonably necessary to meet any alleged evil; enactment of the State Statute was not necessary to protect, nor does it serve the public interest of the State of Florida; the object, purpose and effect of the Statute is to take the copyrighted musical compositions of the complainants, and others similarly situated, for a private purpose, to-wit; to benefit the 367 users within the State of Florida; the said State Statute discriminates against, and in fact, confiscates the complainants' copyrighted musical compositions as well as those of others similarly situated; it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

III. The State Statute is an invasion of complainants' constitutional rights in the following respects:

(a) It interferes with and destroys the pattern of the copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure uniformity and certainty in the field of copyright.

(b) It denies to complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein denies to the complainants due process of law.

(c) It impairs obligations of contracts entered into between complainants and 367 users of music within the State [fol. 430] of Florida, and contracts between members of the Society and the Society, and between the Society and similar societies operating in foreign countries, and contracts between writers and composers and their respective publishers.

(d) It interferes with complainants' liberty of contract in the State of Florida and elsewhere.

(e) It deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

IV. The said State Statute is vague, uncertain and indefinite and fails to apprise complainants, and others similarly situated of what acts they may omit or commit which would constitute a crime under said State Statute.

V. The said State Statute subjects complainants to a multiplicity of suits by each of the 367 users within the State of Florida with whom they have contracts, by each of the State Attorneys in the State of Florida, and by the Attorney General of said State.

VI. The penalties, civil and criminal, and the forfeitures provided for in said State Statute are harsh, oppressive and unreasonable, and such penalties and forfeitures are cruel and unusual.

VII. The said State Statute violates Article I. Sections 8, 9, and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

VIII. Complainants have no adequate remedy at law and are relievable only in this Court of Equity, and if complainants are not afforded the equitable relief prayed for in the [fol. 431] bill of complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said State Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate, and unless an injunctional order is issued complainants will be irreparably damaged.

IX. Complainants are entitled to an injunction enjoining and restraining, until the further order of this Court, the defendants and each of them individually and in their capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society



and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to, detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

[fol. 432] X. That a bond in the sum of \$5,000 conditioned upon the payment to defendants of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined by this order, will adequately protect defendants against any injury that may be suffered in the event that the injunction pendente lite entered herein shall not be made permanent.

XI. The State Statute constitutes an attempt to restrict and to regulate the right of complainants to the full enjoyment of the exclusive rights granted them by the laws of the United States, generally known as the Copyright Laws.

XII. That the motion to dismiss the complaint be denied.

XIII. That this Court has jurisdiction of this suit.

XIV. That the application for interlocutory injunction and the same is granted.

Dated at Gainesville, Florida, this May 17, A. D. 1938

Rufus E. Foster, United States Circuit Judge. Long  
W. Strum, United States District Judge. A. T.  
Long, United States District Judge.

[fols. 433-446] Exhibit "E" (Florida Statute—Senate Bill No. 679) omitted. Printed side page 76, ante.

[fol. 447] IN UNITED STATES DISTRICT COURT

[Title omitted]

**MOTION FOR LEAVE TO AMEND STATEMENT AS TO JURISDICTION  
AND ASSIGNMENT OF ERRORS—Filed August 8, 1938**

Come now defendant State's Attorneys and respectfully move the Court for an Order amending the Statement as to Jurisdiction and Assignment of Errors filed herein on April 25, 1938, in the following respects, to-wit:

**1. Statement as to Jurisdiction:**

By inserting at the end of paragraph (g) 1 and (g) 6, respectively, an asterisk; and at the end of said Statement [fol. 448] as to Jurisdiction a further asterisk followed by a note which shall read: .

"At the time of filing this Statement as required by Rule 12 Paragraph I of the Supreme Court of the United States; no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70<sup>1</sup>2, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein. However, said findings and conclusions do not persuasively show the need for nullifying the action of the Legislature of the State of Florida and do not make it persuasively appear that the unconstitutionality of the statute is reasonably free from doubt."

**2. Assignment of Errors:**

By inserting at the end of the Seventh Assignment of Error an asterisk; and at the end of the Assignment of Errors a further asterisk followed by a note which shall read:

"At the time of filing this Assignment of Errors, as required by Rule 9 of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70<sup>1</sup>2, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein."

and for grounds of this Motion said defendants show:-

That each of said amendments is necessary in order to explain to the Supreme Court of the United States the apparent conflict between the language employed by the [fols. 449-452] defendants in said Statement as to Jurisdiction and Assignment of Errors, respectively, and the facts as disclosed by the Record that the findings of fact and conclusions of law were actually filed. The defendant State's attorneys further move the Court to direct the Clerk of this Court to include in the Transcript of Record transmitted to the Supreme Court of the United States the Order extending Time for Filing the Transcript of Record in this case filed on May 31st, 1938.

(Signed) Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett, Attorneys for Defendant State's Attorneys.

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[fol. 453] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 454] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY THE APPELLANTS, AND OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed August 15, 1938.

The points relied upon by the Appellant State's Attorneys for a reversal of the Order of the Special Statutory Three Judge Court granting Appellees' Motion for Temporary Injunction are, as follows:-

First. The lower Court was without jurisdiction to entertain the Bill of Complaint, or to grant the Temporary Injunction [fol. 455] because it affirmatively appeared that it had no jurisdiction as a Federal Court, in that the requisite jurisdictional amount of \$3,000.00 exclusive of interest and costs, was not involved, and the suit was not one arising under the copyright laws of the United States, or otherwise cognizable in a Federal Court in the absence of such jurisdictional amount.

**Second.** The only portions of the Florida Statute attacked by the Bill of Complaint, with the enforcement of which the Appellants, (defendants below) are charged, viz: Sections 1, 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9, are valid enactments under the police powers of the State of Florida, and the validity of the remaining Sections of said Act need not be considered in this suit.

**Third.** The lower Court abused its discretion in granting the Temporary Injunction on April 4, 1938, without first, or contemporaneously therewith, stating its findings of fact and conclusions of law, as required by Equity Rule 70<sup>1/2</sup>, as amended; even though such findings and conclusions were later made and filed on May 17, 1938, and after entry of this appeal.

[Vol. 456] **Fourth.** The lower Court abused its discretion in granting the Temporary Injunction, without first determining that the unconstitutionality of the State Statute was reasonably free from doubt.

**Fifth.** The lower Court abused its discretion in granting Temporary Injunction in view of the uncontradicted affidavit of Cary D. Landis, Attorney General of the State of Florida, (under whose direction all legal action for the enforcement of the provisions of the State's Statutes must be taken), which showed affirmatively and positively that no legal proceedings for the enforcement of said Statute were pending, threatened or contemplated.

**Sixth.** The Appellees, (Plaintiffs below) come into equity with unclean hands, by asking its aid in the furtherance of their confessedly monopolistic and price-fixing activities, and are not entitled to injunctive relief.

The parts of the record necessary for the consideration of the above points relied upon by Appellants are:

(1) Bill of Complaint, filed February 7, 1938, and all Exhibits thereto.

[Vol. 457] (2) All affidavits filed February 7, 1938 by Plaintiffs in support of their Motion for Temporary Injunction.

(3) Defendants' Motion to Dismiss Bill of Complaint, filed March 3, 1938.



(4) Defendants' Motion to deny Motion for Temporary Injunction and supporting affidavits, filed March 3, 1938.

(5) Memorandum Opinion of the Court, filed April 4, 1938.

(6) Order of Court entered April 4, 1938.

(7) Assignment of Errors, filed April 25, 1938.

(8) Statement as to Jurisdiction, filed April 25, 1938.

(9) Order allowing Appeal, entered April 25, 1938.

(10) Findings of Fact and Conclusions of Law, filed May 17, 1938.

Tyrus A. Norwood, Assistant Attorney General;  
Lucien H. Boggs, Andrew W. Bennett, Attorneys  
for Defendant States Attorneys.

[fols. 458-459] Proof of Service

STATE OF FLORIDA,  
County of Leon:

On this day personally appeared before me a Notary Public in and for the State of Florida at Large, Tyrus A. Norwood, Assistant Attorney General, who, being first duly sworn, on oath says that he did on this day serve, Messrs. Wideman, Wardlaw & Caldwell, Attorneys for Appellees in the foregoing cause with a copy of Statement of Points relied upon by the Appellants, and of the parts of the record necessary for the consideration thereof. The service was made by mailing said copy sealed in an envelope addressed to said: Messrs. Wideman, Wardlaw & Caldwell, Attorneys at Law, West Palm Beach, Florida, with sufficient postage thereon to insure its delivery at destination, the same being mailed in the Post Office at Tallahassee, Florida, on this the — day of August, 1938.

Tyrus A. Norwood, Assistant Attorney General

Sworn to and subscribed before me this the 12 day of August, 1938. Evelyn Davis, Notary Public, State of Florida at Large. My Commission expires Mar. 7, 1939. (Seal.)

[fol. 460] [File endorsement omitted.]

[fol. 461] IN SUPREME COURT OF THE UNITED STATES

APPELLEES' STATEMENT OF ADDITIONAL PARTS OF THE RECORD  
TO BE PRINTED—Filed August 18, 1938

The following parts of the record omitted from appellants' designation are believed to be necessary and material and should be printed in the record on appeal:

- (1) Order convening three-Judge Court filed February 7, 1938.
- (2) Notice of hearing on motion for temporary injunction served on the Governor of the State of Florida, and on defendants and acceptance of service thereof by them filed March 1, 1938.
- (3) Statement that appellees duly filed an injunction bond in the sum of \$5,000. on April 13, 1938, and that proof of service of notice of the filing thereof and of the injunction order were filed in the District Court on April 18, 1938.
- (4) Motion of appellants for leave to amend statement as to jurisdiction and assignment of errors, and order of [fol. 462] August 4, 1938 allowing amendments to statement as to jurisdiction and assignment of errors.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Appellees.

[fol. 463] [File endorsement omitted.]

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Endorsed on cover: Enter George Couper Gibbs. File No. 42,761. N. Florida, D. C. U. S. Term No: 276. George Couper Gibbs, Individually and as Attorney General of the State of Florida, et al., appellants, vs. Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al. Filed August 15, 1938. Term No. 276, O. T., 1938

**FILE COPY**  
**SUPREME COURT OF THE UNITED STATES**

FILED  
AUG 15 1908

CLERK  
JAMES EDWARD OUNLEY

COPIES OF THIS DECISION

**No. 276**

**CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL  
OF THE STATE OF FLORIDA, ET AL.,**

*Appellants,*

**vs.**

**GENE BUCK, INDIVIDUALLY, AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,  
ETC., ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF FLORIDA.**

**STATEMENT AS TO JURISDICTION.**

**GEORGE COUPER GIBBS,**  
*Attorney General of the State of Florida;*

**TYRUS A. NORWOOD,**  
*Assistant Attorney General;*

**ANDREW W. BARNETT,**

**LUCIEN H. BOGGS,**

*Counsel for Appellants.*

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### STATUTES CITED.

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IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION

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Equity. No. 12.

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GENE BUCK, INDIVIDUALLY, AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ETC., ET AL.,  
*Complainants,*

vs.

CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL  
OF THE STATE OF FLORIDA, ET AL.,  
*Defendants.*

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**STATEMENT AS TO JURISDICTION.**

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**(a) The Statutory Provisions Sustaining the Jurisdiction.**

The defendants rely upon U. S. C., Title 28, sections 345 and 380, respectively, as amended, as sustaining the jurisdiction of the Supreme Court of the United States to review the above entitled cause upon appeal.

**(b) The Statute of the State of Florida, the Validity of Which is Involved.**

The statute of the State of Florida, the validity of which is involved, is the Act of June 9, 1937, being Chapter 17807, Laws of Florida, 1937, General Laws, Vol. 1, pages 204 to 214, inclusive. This statute is directed at monopolistic

practices of the owners of copyrighted musical compositions, and prescribes *rules* under which the property may be sold in the State of Florida. The only sections of the statute pertinent to this action against the defendants are sections 1 and its dependent sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9. The defendant prosecuting officers have no duties to perform with respect to any of the remaining sections. Primarily the pertinent sections prohibit price-fixing in intrastate transactions by combinations of copyright owners acting in concert. A *verbatim* copy of the statute is attached as Appendix "A".

**(c) The Order Granting Interlocutory Injunction Sought to be Reviewed.**

The order appealed from was dated and entered April 4, 1938. The petition for appeal was presented April 25, 1938.

**(d) The Nature of the Case and of the Ruling of the Court.**

The action herein was instituted February 7, 1938, for the purpose of enjoining the enforcement of and declaring void each and every part of the Florida statute, as violative of the Constitution of the United States. Complainants filed their motion for interlocutory injunction and supporting affidavits, and defendants filed a motion to dismiss the bill, based upon the absence of Federal jurisdiction and other grounds, a motion to deny complainants' motion for interlocutory injunction and supporting affidavits. These motions were heard March 3, 1938, by the specially constituted District Court, composed of Circuit Judge Foster and District Judges Strum and Long.

On April 4, 1938, the court rendered a memorandum opinion and entered an order denying the motion to dismiss the bill and enjoining, until further order of the court, the defendant prosecuting officers, individually and officially, from

directly or indirectly bringing any proceeding, criminal or civil, at law or in equity, to enforce any of the provisions of said statute, or from threatening so to do. *Verbatim* copies of the opinion and order are attached as Appendix "B" and Appendix "C", respectively.

**(e) Cases Sustaining the Jurisdiction of the Supreme Court of the United States.**

*Pope et al. v. Blanton County Judge et al.*, 299 U. S. 521;

*Railroad Comm. v. Maxcy*, 281 U. S. 82;

*Public Service Comm. v. Wisconsin Telephone Co.*, 289 U. S. 67, 71.

**(f) The Substantial Questions Involved.**

This appeal involves the following substantial questions:

QUESTION 1. Had the District Court jurisdiction as a Federal court to take any action whatsoever in this suit other than to dismiss the bill for want of jurisdiction?

Federal jurisdiction is predicated in the bill upon the assertion that the value of the matter in dispute is in excess of the sum of \$3,000, exclusive of interests and costs (bill, par. 6), and that the action arises under the Constitution and laws of the United States (bill, par. 7). Thus, if Federal jurisdiction exists, it is by virtue of U. S. C., Title 28, Section 41 (1). Complainants make no contention that it is a suit "arising under the \* \* \* copyright \* \* \* laws". U. S. C., Title 28 Section 41 (7). The suit does not involve the validity of any copyright or the infringement thereof, but merely rights incidental to the copyright laws, in that the property interest of the complainants is a creature of such laws, as in *Albright v. Teas*, 106 U. S. 613.

The allegation of the bill that the value of the matter in dispute is in excess of \$3,000, exclusive of interests and

costs, was specifically challenged by defendants' motion to dismiss, and complainants have failed to establish it. The property rights which the bill charges will be adversely affected by the statute are public performance rights in a large number of copyright musical compositions, which, up to December 31, 1940, have been assigned to American Society of Composers, Authors and Publishers, an unincorporated association not for profit, organized under the laws of the State of New York. The members of the Society consists of 123 music publishers and approximately 1,000 authors and composers, all elected to membership by a self-perpetuating board of directors. All revenues derived from the licensing of these performance rights are collected by the Society. These revenues are applied, first, to the cost of its own operations; second, to payment of an unstated portion to some 44,000 foreign composers, authors and publishers, non-members of the American Society but members of foreign societies represented by the American Society in licensing their American performance rights; third, a reserve fund not exceeding 10% maintained by the Society for divers purposes; and finally, the residual net profits are divided into two equal parts, one of which is distributed among the publisher members as the board, in its discretion, may determine; the other, among the composer and author members, as the board's discretion may determine.

Gross receipts of the Society for the year 1936 from all Florida licenses were \$59,306.81. Neither the particular musical compositions, nor the names of their composers, authors or publishers from which these revenues were derived are stated, nor with respect to Florida operations, is any showing made as to the cost of the Society's operations, the amount of payments to foreign non-member affiliates, nor the net profit distribution to any of the Society's members. Estimates of the supposed cost of compliance with the requirements of the Florida statute are included in the bill.



but these include costs of investigations and prosecution of infringements and other activities not prevented by the statute. Estimates are also given as to the supposed value of the copyrights owned by certain of the plaintiffs, but these figures are not restricted to rights in Florida, but cover the entire geographical field of copyright. Considering the entire picture made by the bill, no means is offered by which the value of the rights of the Society itself, or of any publisher member or of any composer or author free of the restrictions imposed by the Florida Statute may be compared against the value of those rights subject to the restrictions of the statute.

So far as concerns complainant American Society of Composers, Authors and Publishers, the bill and its exhibits affirmatively show that it is a non-profit association and can sustain no loss; such loss, if any, falling upon its respective members (*KVOS v. Associated Press*, 299 U. S. 269), though in amounts unascertainable because of the uncontrolled discretion of the directors in apportioning profits.

QUESTION 2. May a combination of owners of copyrights admittedly organized for price-fixing invoke the aid of a court of equity to assist them in the furtherance of their monopolistic price-fixing practices?

This question was squarely raised in the motion to dismiss the bill. The bill and exhibits thereto affirmatively show that a substantial number of the copyright owners of musical compositions in the United States (approximately 123 United States music publishers, 1,000 United States composers and authors, and 44,000 foreign publishers, composers and authors) have vested the exclusive right to license the performing rights of their combined copyrights in the American Society of Composers, Authors and Publishers, with the power "to fix the rate, time and manner of payment of royalties".

This price-fixing power and all other functions of the said Society are wielded by a self-perpetuating board of directors in whom the entire management and operation of the Society is vested by the Articles of Association. The Society issues only blanket licenses covering the vast number of copyrights in the pool upon payment of an annual fee by the licensee. With respect to radio broadcasting stations the annual fee includes a *fixed per cent of the gross income of the station* (See *Standard Oil Co. (Ind.) et al. v. United States*, 283 U. S. 163, 174, note #9). With respect to all other licenses, the royalty is a straight annual charge without respect to the income of the licensee.

There are 367 license contracts in force in the State of Florida between the Society and radio broadcasting stations, motion picture theatres, hotels, restaurants, dance halls and other amusement enterprises. Some 30,000 similar license contracts are in force throughout the United States. The licensee must accept a license covering all the copyrighted musical compositions concentrated in the pool and may not acquire a license limited only to that portion required by his business. "The license fees in all these cases are fixed and determined by the Society on behalf of all its members" (bill, par. 23).

#### **(g) The Abuse of Discretion in Granting the Interlocutory Injunction.**

The specially constituted District Court, in granting the interlocutory injunction, abused its discretion in the following respects:

1. By entering the order denying defendants' motion to dismiss the bill and granting the interlocutory injunction upon a memorandum opinion, without any findings of fact or conclusions of law which persuasively show the need for nullifying the action of the Legislature of the State of

Florida, as is required by Equity Rule 70½, as amended November 25, 1935.<sup>1</sup>

2. By taking any action other than to dismiss the bill for want of jurisdiction when complainants, and each of them, failed to establish the existence of the jurisdictional amount of \$3,000, exclusive of interest and costs.

3. By lending injunctive aid to a combination of owners of copyrights, admittedly organized for price-fixing, in the furtherance of that combination's monopolistic price-fixing practices.

4. By failing to recognize and to hold that the defendant prosecuting officers have no duties to perform under, nor can any action be taken by them with respect to any provisions of the statute except section 1 and its dependent sections. The authority of the defendant prosecuting officers is expressly limited by the provisions of section 9 of the statute to proceedings "against any combination as defined in section 1<sup>2</sup> and against any of its members, agents or representatives".

5. By failing to recognize and to hold that section 1 and its dependent sections constitute a valid exercise of the police power of the Legislature of the State of Florida to restrain monopolistic practices within the State of Florida.

6. By granting the interlocutory injunction when it does not persuasively appear from any finding of facts and con-

<sup>1, 2</sup> "At the time of filing this statement as required by Rule 12, paragraph 1 of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70½, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein. However, said findings and conclusions do not persuasively show the need for nullifying the action of the Legislature of the State of Florida and do not make it persuasively appear that the unconstitutionality of the statute is reasonably free from doubt."

clusions of law that the unconstitutionality of the statute is reasonably free from doubt.<sup>3</sup>

CARY D. LANDIS,

*Attorney General;*

TYRUS A. NORWOOD,

*Assistant Attorney General;*

ANDREW W. BENNETT,

LUCIEN H. BOGGS,

*Solicitors for Defendants.*

And on August 8, 1938, Defendants filed an Order of Court (signed on August 4, 1938) Allowing Amendments to Statement as to Jurisdiction and Assignment of Errors, in words and figures following:

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION.

GENE BUCK, individually and as President of the American  
Society of Composers, Authors and Publishers, etc., *et al.*  
Complainants,

*vs.*

CARY D. LANDIS, Individually and as Attorney General of the  
State of Florida, *et al.*, Defendants.

ORDER ALLOWING AMENDMENTS TO STATEMENT AS TO JURIS-  
DICTION AND ASSIGNMENT OF ERRORS.

This day this cause came on to be heard upon defendant  
State's attorneys' motion and upon consideration thereof it  
is accordingly

<sup>3</sup> "At the time of filing this Statement as required by Rule 12, Paragraph I of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70½, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein. However, said findings and conclusions do not persuasively show the need for nullifying the action of the Legislature of the State of Florida and do not make it persuasively appear that the unconstitutionality of the statute is reasonably free from doubt."



Considered and ordered that defendant State's attorneys are hereby granted leave to amend the original Statement as to Jurisdiction and the original Assignment of Errors filed in this cause on the 25th day of April, 1938, in the following particulars, to-wit:

1. Statement as to Jurisdiction:

By inserting at the end of paragraphs (g) 1 and (g) 6, respectively, an asterisk; and at the end of said Statement as to Jurisdiction a further asterisk followed by a note which shall read:

"At the time of filing this Statement as required by Rule 12, Paragraph I of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70½, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein. However, said findings and conclusions do not persuasively show the need for nullifying the action of the Legislature of the State of Florida and do not make it persuasively appear that the unconstitutionality of the statute is reasonably free from doubt."

2. Assignment of Errors:

By inserting at the end of the Serenth Assignment of Error an asterisk; and at the end of the Assignment of Errors a further asterisk followed by a note which shall read:

"At the time of filing this Assignment of Errors, as required by Rule 9 of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70½, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein."

and the Clerk of this Court is hereby directed to amend the said Statement and said Assignment of Errors as hereinabove allowed and further to include the said Motion and

this Order in the Transcript of Record on this appeal and the said Clerk is hereby further directed to include the Order extending Time for Filing Transcript of Record in this case in the Supreme Court of the United States, filed herein on the 31st day of May, 1938.

Done and Ordered this 4th day of August, 1938, at Jacksonville, Florida.

LOUIE W. STRUM,  
*United States District Judge.*

**APPENDIX A.****Chapter 17807—Acts of 1937.****Senate Bill No. 679.**

AN ACT Declaring to be an Unlawful Monopoly and Its Purposes to be in Restraint of Trade, any Combination of Persons, Firms or Corporations Which Determine the Amount of Money to be Paid to it or to its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Compositions, When Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify Upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare That any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made With any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Non-enforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Protection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement, Radio Broadcasting and Radio Receiving and Radio Re-Broadcasting Station Affiliated With Other Persons, Firms or Corporations Outside of the State of Florida. Against the Collection of License Fees or Other Exactions by Such of the State Affiliates for or on Account of any Combination Herein Declared Unlawful; to

Provide all Liability for any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription or Sound Producing Apparatus, or by Personal Performance Coming Outside of the State of Florida and Used Herein to Rest Exclusively on the Out of the State Person, Firm or Corporation Originally Sending the Same Into This State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, Under the Direction of the Attorney General, Upon the Complaint of any Party Aggrieved by any Violation Hereof to Proceed to Enforce the Penalties Hereof Against Such Combination and Any of its Members, Agents or Representatives; to Empower any party Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide That the Terms of this Act Shall be Cumulative; to Provide that any Part of this Act Declared Illegal Shall not Affect the Validity of the Remaining Parts Hereof.

*Be It Enacted by the Legislature of the State of Florida:*

SECTION 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity called herein a combination, when the members therein constitute a substantial number of the persons, firms, or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this



State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches; or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance; or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties, shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or

with other performers, actors and singers, or by any individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

SECTION 2-B. In the event any author, composer or publisher or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price and collect the same, for private or public performances or profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

SECTION 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

SECTION 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with

such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

SECTION 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

SECTION 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the

same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands or actors, or by loud speakers, radio, sound production or reproduction apparatus or instrumentalities, or electrical transcriptions or by other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State, with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instru-



mental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions, and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act: and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who

originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

SECTION 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

SECTION 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent

for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof;

SECTION 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

SECTION 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

SECTION 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in

which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

SECTION 10-B. In the event of the failure of the State's Attorney and Attorney General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending a petition praying that the Defendant or Defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

SECTION 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of \$100.00 against each of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff



may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

SECTION 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, imperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such ~~excluded~~ parts had not been included herein.

SECTION 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

SECTION 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State, June 10, 1937.

## APPENDIX B.

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION.

Equity. #12.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, etc.  
*et al.*, Complainants,

*vs.*

CARY D. LANDIS, Individually and as Attorney General of the State of Florida, *et al.*, Defendants.

## MEMORANDUM OPINION.

## Per CURIAM:

The Complainants, American Society of Composers, Authors and Publishers, an unincorporated association organized and existing under the laws of the State of New York, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others filed their bill of complaint on the 7th day of February 1938 against the Attorney General of the State of Florida and a number of State Attorneys, in which bill it is sought to enjoin the defendants from enforcing the provisions of an Act of the Florida Legislature passed during the Session of 1937, which law declares any combination of persons, firms or corporations, which determine the amount of money to be paid to it or to its members for the purpose of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions when such combination is composed of a substantial number of all musical composers, copyright owners or their heirs, successors or assigns, to be an unlawful monopoly and its purpose would be in restraint of trade. It makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial num-

ber of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization either in Florida or elsewhere if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Florida, for the purpose of preventing free competition between different copyright owners. There are penalty provisions applying where any attempt is made to collect license fees by the owners of copyright and requiring authors, composers and publishers to specify on any published musical composition prepared for use in Florida the selling price of such composition. Other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the State of Florida.

The bill alleges that the enforcement of this Act will violate rights granted to them by the copyright Act of Congress; that it is in violation of the Federal Constitution and impairs the terms of certain existing contracts held by these plaintiffs.

The cause is before this Court upon application for interlocutory injunction; upon the bill of complaint, affidavits filed therewith and upon motion to dismiss the bill of complaint.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act to the irreparable injury of plaintiffs unless such injunction order is issued.

It appearing to the Court that plaintiffs have shown that great damage will be inflicted upon them if preliminary injunction is not granted, and that there is grave doubt of the constitutionality of the Act;

It is considered by the Court that an order be entered granting such interlocutory injunction and that the motion to dismiss the bill be denied.

(S.)

RUFUS E. FOSTER,  
*Circuit Judge;*

(S.)

LOUIE W. STRUM,  
*District Judge;*

(S.)

A. V. LONG,  
*District Judge.*

## APPENDIX C.

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, etc., *et al.*  
Complainants,

*vs.*

CARY D. LANDIS, Individually and as Attorney General of the  
State of Florida, *et al.*, Defendants.

## ORDER

This cause coming on to be heard and the same having  
been argued by counsel for the respective parties, and the  
Court having inspected the record and the briefs filed:

It is ordered:

1st. That the application for interlocutory injunction be  
and the same is granted.

2nd. That the defendants, Cary D. Landis, individually  
and as Attorney General for the State of Florida; E. Dixie  
Beggs, Jr., individually and as State Attorney for the  
First Judicial Circuit of Florida; O. C. Parker, Jr., indi-  
vidually and as State Attorney for the Second Judicial  
Circuit of Florida; A. K. Black, individually and as State  
Attorney for the Third Judicial Circuit of Florida; William  
A. Hallowes, III individually and as State Attorney for the  
Fourth Judicial Circuit of Florida; J. W. Hunter, individ-  
ually and as State Attorney for the Fifth Judicial Circuit  
of Florida; Chester B. McMullen, individually and as State  
Attorney for the Sixth Judicial Circuit of Florida; Murray  
Sams, individually and as State Attorney for the Seventh  
Judicial Circuit of Florida; J. C. Adkins, individually and  
as State Attorney for the Eighth Judicial Circuit of Flor-  
ida; Murray W. Overstreet, individually and as State At-  
torney for the Ninth Judicial Circuit of Florida; L. Grady  
Burton, individually and as State Attorney for the Tenth  
Judicial Circuit of Florida; G. A. Worley, individually and  
as State Attorney for the Eleventh Judicial Circuit of  
Florida; Roy D. Stubbs, individually and as State Attorney



for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; and each of them individually and in their respective capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained until the further order of this Court from bringing directly or indirectly any proceedings at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3rd. That the motion made by the defendants to dismiss the bill of complaint be and the same is denied.

4th. That the defendants be given thirty (30) days from the date hereof to answer.

This order is made conditional upon the plaintiffs filing herein within thirty (30) days a bond in the sum of five thousand (\$5,000.00) dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order; said bond to be

approved by the Clerk of the United States Court for the Northern District of Florida.

Done and ordered this the 4th day of April, A. D. 190

(S.) RUFUS E. FOSTER,  
*Circuit Judge,*

(S.) LOUIE W. STRUM,  
*District Judge.*

(S.) A. V. LONG,  
*District Judge.*

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CHARLES SUMNER CROLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 276

CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

*Appellants.*

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

BRIEF IN SUPPORT OF MOTION OF APPELLANT STATE'S ATTORNEYS TO VACATE DECREE OF LOWER COURT AND DIRECT DISMISSAL OF BILL OF COMPLAINT.

TYRUS A. NORWOOD,  
*Assistant Attorney General  
of the State of Florida.*

LUCIEN H. BOGGS,  
ANDREW W. BENNETT,  
*Attorneys for Appellant State's Attorneys.*



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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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**No. 276**

---

CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

*Appellants,*

*vs.*

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

---

**BRIEF IN SUPPORT OF MOTION OF APPELLANT  
STATE'S ATTORNEYS TO VACATE DECREE OF  
LOWER COURT AND DIRECT DISMISSAL OF BILL  
OF COMPLAINT.**

---

**The Opinion of the Court Below.**

The only opinion of the lower court—a three-judge Federal court sitting as United States District Court for the Northern District of Florida—with which this brief is concerned is that contained in the court's order of July 11, 1938, which has not yet been officially reported. A copy is attached as Exhibit "F" to the motion to which this brief is addressed.

**The Jurisdiction of the Supreme Court.**

There has been separately filed the statement as to jurisdiction required by paragraph 1 of Rule 12, which shows

the jurisdiction of this Court over the appeal itself. Jurisdiction to entertain the instant motion rests in the inherent power of the Court to save itself from the decision of controversies which have become moot.

### Statement of the Case.

Hereafter in this brief the appellants and the appellees will be referred to as defendants and plaintiffs, the status which, respectively, they occupied in the court below.

Plaintiffs filed their bill in the District Court to enjoin the enforcement of a State statute alleged to be repugnant to the Federal Constitution. Chapter 17807, Acts of Florida, 1937 (Motion,\* Ex. "G"). The defendants were Cary D. Landis, then Attorney General of the State of Florida, and the fifteen State's Attorneys, each of them a prosecuting officer for one of the judicial circuits of Florida. Plaintiffs' motion for temporary injunction was heard before the three-judge court March 3, 1938, and resulted in the granting of an order on April 4, 1938, for a temporary injunction restraining the defendants from enforcing the State statute.

From that order defendants appealed to this Court, pursuant to *U. S. C., Tit. 28, Sec. 780*, the order allowing the appeal being entered April 25, 1938.

On May 10, 1938, defendant Cary D. Landis, Attorney General of Florida, died (see suggestion of death filed in this Court contemporaneously with the motion of the appellants); and, on May 16, 1938, George Couper Gibbs became the duly appointed, qualified, and acting Attorney General of Florida.

Thereafter on May 31, 1938, the defendant State's Attorneys filed in the District Court suggestion of the death of

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\* The word "Motion", appearing in brackets at numerous places in this brief, refers to the motion filed by the appellant State's Attorneys to vacate the decree of the lower court and direct dismissal of the bill.

Landis, and a motion to dismiss the suit on the ground that the question involved in the suit had become moot for want of a necessary party (Motion, Exs. "A" and "B").

Thereafter on July 11, 1938, plaintiffs moved the District Court for leave to file a supplemental bill wherein they sought to implead as a party defendant the successor Attorney General of Florida, George Couper Gibbs (Motion, Ex. "C"). Attorney General Gibbs filed special appearance and objections to being made party defendant (Motion, pp. 5-7, Ex. "D"), with a supporting affidavit in which he denied categorically that any proceedings were pending or threatened looking to the enforcement of the statute. At the same time the defendant State's Attorneys also filed their objections to the proposed substitution of Attorney General Gibbs (Motion, Ex. "E"). These several motions and objections were heard before the three-judge court July 11, 1938, and resulted in an order which denied defendant State's Attorneys' motion to dismiss and denied plaintiffs' motion for leave to file supplemental bill (Motion, Ex. "F").

Since the entry of the last mentioned order the defendant State's Attorneys have perfected their appeal by filing in this Court their transcript of record, statement as to jurisdiction, statement of points relied upon, and designation of parts of the record to be printed. After so doing they further filed in this Court a suggestion of the death of Attorney General Landis, and the motion to which this brief is addressed.

### **Argument.**

This brief contains no specifications of assigned errors (Rule 27, par. 2 (e)), because its object is not to induce this Court to correct the "error" of the District Court in refusing to dismiss the suit upon the death of Judge Landis. Federal appellate statutes would not permit such a procedure. The purpose of the motion, and of this brief,

is to show that since the death of Judge Landis there exists no controversy calling for the exercise of the judicial power.

The procedure invoked by the motion—viz., to remand the cause with directions to dismiss the bill without prejudice—has been repeatedly followed by this Court in cases where the question involved in the appeal has become moot.

*Warner Valley Stock Co. v. Smith*, 165 U. S. 28;

*Aleandrino v. Quezon*, 271 U. S. 528;

*Berry v. Davis*, 242 U. S. 468;

*Heitmuller v. Stokes*, 256 U. S. 359;

*Atherton Mills v. Johnston*, 259 U. S. 13;

*Board of Flour Inspectors v. Glover*, 161 U. S. 101;

*Public Utility Commrs. v. Compañia General de Tabacos*, 249 U. S. 425;

*Duke Power Co. v. Greenwood County*, 299 U. S. 250.

The defendant State's Attorneys, who are the sole surviving appellants in this cause, contend that their motion makes out a perfect case for the application of this procedure because:

(1) Under the Florida statute challenged by this suit the only necessary party defendant was the person filling the office of Attorney General of Florida, since no action looking to its enforcement might be taken save such as he might direct.

(2) The suit, while styled against Landis "individually and as Attorney General of the State of Florida", was in reality an action brought against him individually, and died with him.

These contentions embody a position taken consistently by the defendant State's Attorneys at all times since the death of Judge Landis, as plainly appears from the proceedings had in the court below, all of which are incorporated by reference in the motion.



## POINT I.

The person occupying the office of Attorney General of Florida was the only necessary party defendant to this suit.

The statute attacked by the bill of complaint in this case is Chapter 17807, Laws of Florida, 1937 (Motion, Ex. "G"). For present purposes it may be described briefly as a statute declaring unlawful any combination comprising a substantial number of those owning public performance rights in copyrighted music, if such combination is formed for price-fixing purposes; forbidding the operation of such combinations in the State of Florida, and prescribing penalties both civil and criminal for violation. The wording of the following portions of the statute is material to the consideration of the point under discussion (Motion, p. 25):

"SECTION 9: The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, **under the direction of the Attorney-General**, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. \* \* \* (Emphasis supplied.)

"SECTION 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plain-

tiff and others similarly situated, as the State's Attorney and the Attorney General could have instituted under the terms of this Act."

The question is, what is the meaning of the phrase "under the direction of the Attorney General" as used in Section 9?

To answer this question it is not necessary to go further than the decision of this Court in *Warner Valley Stock Co. v. Smith, supra*. That was a suit in equity brought against Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, to enjoin them from interfering with the alleged rights of the Warner Valley Stock Company to certain lands in Oregon, and to require them to issue to it patents for those lands. Pending an appeal to this Court, defendant Hoke Smith resigned his office as Secretary of the Interior, and the question before the Court was whether under those circumstances the suit might further proceed.

As in the case at bar, the defendant whose office had become vacant was not the only defendant, and, as here, the contention was made that the case should proceed against his co-defendant. Under Federal statutes then in force the Commissioner of the General Land Office was required to

"\* \* \* perform, **under the direction of the Secretary of the Interior**, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government \* \* \*." (Emphasis supplied.)

Construing the statutory phrase, "under the direction of the Secretary of the Interior", the Court said (165 U. S. 34, 35):

"The phrase 'under the direction of the Secretary of the Interior,' thus used in these statutes, as was said by Mr. Justice Lamar, speaking for this court, 'is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.' *Knight v. United Land Asso.*, 142 U. S. 161, 177, 178 (35: 974, 979, 980); *Orchard v. Alexander*, 157 U. S. 372 (39: 738)."

"\* \* \* the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. **To maintain such a bill against the subordinate officer alone, without joining his superior whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading.** 3 Calvert, Parties (2d ed.), chap. 13." (Emphasis supplied.)

Applying this definition to the phrase "under the direction of", this Court thereupon reversed the decree of the lower court, and directed that the bill be dismissed for want of proper parties.

There is nothing in the Constitution or laws of the State of Florida which would justify a construction of the phrase "under the direction of" different from that placed upon it by this Court in the *Warner Valley* case.

The State's Attorneys in Florida are constitutional officers, but the Florida Constitution (Art. V, Sec. 15) leaves

the designation of their duties entirely to legislative enactment.

"SECTION 15. The Governor, by and with the consent of the Senate, shall appoint a State Attorney in each judicial circuit, whose duties shall be prescribed by law, and who shall hold office for four years."

Therefore, it was competent for the Legislature to prescribe, as it did in this case, that the State's Attorneys could take no action looking to the enforcement of the statute except upon direction from the Attorney General.

The Attorney General, too, is a constitutional officer, but here again the Legislature is given power to fix the duties of the office (Fla. Const., Art. IV, Sec. 22).

It has been held by the Supreme Court of Florida that, as the successor of the British Attorney General, he is also clothed with all of the powers which at common law were vested in that officer of the English Crown.

*State v. Gleason*, 12 Fla. 190, 213;

*State v. Kress & Co.*, 115 Fla. 189, 155 So. 823.

The law is clear that in the absence of constitutional or statutory restrictions the Attorney General may himself conduct such criminal prosecutions as he sees fit.

5 *Am. Jur.* 252, and numerous cases there cited;

*State v. Finch*, 128 Kan. 665, 280 Pac. 910, 66 A. L. R. 1359;

*State ex rel. Young v. Kent*, 96 Minn. 255, 104 N. W. 948, 1 L. R. A. (N. S.) 826;

*State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N. W. 269, 20 L. R. A. (N. S.) 1127.

Far from restricting the common law powers of the Attorney General, the Florida statute (C. G. L. 1927, Sec. 125) expressly preserves to him all such powers:

"\* \* \* he shall have and perform all such powers and duties incident or usual to such office \* \* \*"  
(Emphasis supplied.)

The power of the Attorney General under the Constitution to conduct prosecutions himself has been expressly recognized by the Florida Legislature. Chapter 11828, Acts of 1927 (C. G. L. 1927, Secs. 134-139, incl.), provided for the appointment of three special assistants to the Attorney General who were given power to prosecute actions in the name of the State of Florida to like effect as the State Attorneys. Section 5 of that Act (*ibid.*, Sec. 138) contained this significant clause:

"Nothing in this law shall be held or construed to impair **the constitutional powers of the Attorney General to personally appear at and conduct any case civil or criminal** \* \* \*." (Emphasis supplied.)

This statute is now repealed (Ch. 14556, Acts 1929, extra. sess. Sec. 1), but the legislative construction of the constitutional powers of the Attorney General, of course, remains unimpaired.

It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word in the statute under construction.

*Market Co. v. Hoffman*, 101 U. S. 112, 115;

*Ex parte Public National Bank*, 278 U. S. 101, 104.

Since the words "under the direction of the Attorney General" are to be given significance and effect, they can only be construed in their ordinary meaning, viz: that prosecutions under this Act may be begun only at the command, or with the express permission, of the Attorney General. If prosecutions under this Statute could be instituted by the State Attorneys without the Attorney General's permission, then the above quoted phrase is meaningless. We submit that an information charging a violation of this Statute, which did not show that it was filed with permission of the Attorney General, would be subject to a motion to quash.



The Florida statutes further provide (C. G. L. 1927, Sec. 131):

**"The Attorney-General shall exercise a general superintendence and direction** over the several State attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the State attorneys, shall give them his opinion upon any question of law." (Emphasis supplied.)

At the hearing before the three-judge court, plaintiffs cited this section and contended that the clause in the statute under attack placing all proceedings for the enforcement under the direction of the Attorney General was merely declaratory of pre-existing law.

The wording of Sec. 131, C. G. L., does not support their contention, for in that statute the direction to be exercised by the Attorney General is qualified—"the Attorney General shall exercise a **general** superintendence and direction over the several State Attorneys". That is a very different thing from saying, as is done in Chapter 17,807, that "it shall be the duty of the State's Attorney in their respective circuits, **under the direction of the Attorney General**, to institute proceedings". Under well-known rules of statutory construction due weight must be given to the word "general" in the older statute. The term "general" is defined by Webster's Twentieth Century Dictionary (1935) as follows:

**"Extensive though not universal; not limited in scope; used of authority conferred, etc."** (Emphasis supplied.)

This definition has been accepted in a number of reported cases. See especially *Blair v. Howell*, 68 Iowa 619, 28 N.W. 199, 200.

None of the numerous statutes dealing with the powers and duties of State's Attorneys (see especially C. G. L.

1927, Secs. 4739-4747, incl.) suggest any limitation on the constitutional power of the Attorney General himself to conduct prosecutions.

Thus, at the time of the enactment of Chapter 17,807, Laws of Florida, 1937 (the statute here challenged), we find the Attorney General vested by the Constitution and Laws of the State with authority as its chief law officer both to prosecute cases in the interest of the State personally and to give general superintendence and direction to State Attorneys in the conduct of such cases. Viewed in this broad prospective, it is obvious that the function of the clause "under the direction of the Attorney General" is to place a special limitation on the powers of the State Attorneys, one not applicable in general to the performance of their duties. In other words, "under the direction of the Attorney General" operates as a special limitation on Sec. 4739, C. G. L. 1927, which makes it the duty of the State Attorney,

"\* \* \* to appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the State all suits, applications or motions, civil or criminal, in which the State is a party."

Manifestly the legislative policy was, that while the prosecution of ordinary crimes and offenses might be initiated by the State Attorney subject only to the general supervisory powers of the Attorney General, in prosecutions under Chapter 17,807, the State Attorney was not authorized to move at all except at the Attorney General's direction. This construction is corroborated by sec. 10-B of Chapter 17,807, copied above, which provides that "in the event of the failure of the State's Attorney and Attorney General to act promptly \* \* \* when requested so to do by any aggrieved party" then such party may himself

institute such civil proceeding as the "State's Attorney and the Attorney General could have instituted."

The statute exercised the legislative power in a new field. Never before had the State of Florida attempted to prescribe any regulation concerning the sale or licensing of public performance rights under copyrights within its borders—a problem which by its very nature was State-wide in scope. Not only was it important that a uniform policy of enforcement should be maintained but also that the directing officer should have at his command the amplest facilities for gathering and collating the necessary facts upon which the decision to prosecute or not to prosecute must be based. It was natural and proper that the legislature should wish to centralize all enforcement proceedings in the highest law officer of the State.

Unlike the situation in *Gorham Mfg. Co. v. Wendell*, 261 U. S. 1, there is in Florida no enabling act permitting the substitution of successor State officers, and no court decision holding that they may be substituted without the consent of the successor officers.

To recapitulate: the construction of the phrase "under the direction of the Attorney General" for which appellants contend is in accordance with the plain and ordinary meaning of the words, in harmony with the Constitution and statute law of Florida, and is based upon a comprehensible legislative policy. When this construction is applied, it is readily seen that the person occupying the office of Attorney General of Florida is the only necessary party to such a suit as the plaintiffs have brought. The State's Attorneys are powerless to act save under the direction of the Attorney General while he could act without them. The State's Attorneys occupy precisely the status of the Commissioner of the General Land Office in *Warner Valley Stock Co. v. Smith*, *supra*.

## POINT II.

The suit, while styled against Landis "individually and as Attorney General of the State of Florida", was in reality an action brought against him individually, and it died with him.

In *Ex Parte Young*, 209 U. S. 123, this Court was called upon to determine whether a suit brought against the Attorney General of Minnesota to enjoin him from enforcing the provisions of a State statute alleged to be unconstitutional was a suit against the State or one against the individual who occupied the office of Attorney General. After a full review of the authorities, the Court decided it was a suit against the individual and not against the State; hence not in violation of the Eleventh Amendment to the Federal Constitution. That principle has been repeatedly followed in later decisions, and there can be no dispute about it now. That doctrine, however, has consequences that are ineluctable. The suit not being against the State, it follows that upon the separation of the person in question from his public office, whether by death, expiration of term, or resignation, the action against him must abate.

*Warner Valley Stock Co. v. Smith, supra*;

*Bernardin v. Butterworth*, 169 U. S. 600;

*Chandler v. Dix*, 194 U. S. 590;

*Pullman Co. v. Croom*, 231 U. S. 571;

*Richardson v. McChesney*, 218 U. S. 487;

*Pullman Co. v. Knott*, 243 U. S. 447;

*Irwin v. Wright*, 258 U. S. 219;

*Gorham Mfg. Co. v. Wendell, supra*.

The principle applied to suits against State and Federal officers alike. In *Bernardin v. Butterworth, supra*, this Court pointed out the inconvenience resulting from the application of the doctrine to Federal officers, and this resulted

in the enactment by Congress of the Act of February 8, 1899 (30 Stat. 822), which was subsequently incorporated in *U. S. C., Tit. 28, Sec. 780*.

Later in *Irwin v. Wright, supra*, this Court suggested that the Act of February 8, 1899, might be enlarged so as to permit the substitution of State officers in proper cases. Pursuant to that suggestion, by the Act of February 13, 1925 (43 Stat. 941), Congress provided that the successors to State officers might be impleaded in proper cases. The last mentioned statute now appears as Subsection (b) of *U. S. C., Tit. 28, Sec. 780, supra*.

In the enactment of this legislation consideration was given to the fact that not in all cases could substitution be made, for Subsection (a) of Sec. 780 contains the limitation—

“ . . . if . . . it be satisfactorily shown to the Court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.”

Subsection (c) of Sec. 780 prescribes that before any substitution is made the officer to be affected—

“ . . . unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.”

The effect of these limitations came up squarely for consideration in *Ex parte LaPrade*, 289 U. S. 444, decided May 22, 1933 (the case upon which in the case at bar the three-judge Federal Court rested its decision to deny plaintiff's motion for leave to file supplemental bill impleading Judge Gibbs as successor Attorney General to Judge Landis deceased).

In that case, one Peterson, then Attorney General of Arizona, was sued in equity by two railroad companies with



the object of enjoining him from enforcing an Arizona statute which prescribed limitations of length of freight and passenger trains operating in that State. Shortly prior to final hearing before the three-judge court, Peterson's term of office expired, and LaPrade succeeded him in office. Under the supposed authority of *U. S. C., Tit. 28, Sec. 780*, the plaintiffs served LaPrade with notice of intention to substitute him as defendant in place of Peterson. LaPrade filed special appearance and objections and, these being overruled, the lower court entered final decree enjoining LaPrade from enforcing the statute. LaPrade's objections were to the effect that the suit being against his predecessor individually, the questions involved became moot upon expiration of the latter's term of office; that, there being no pleading charging him with having threatened to enforce the statute, there was no cause of action against him.

After the entry of final decree LaPrade petitioned this Court for a writ of mandamus to require the court below to dismiss the suits. The petition was granted and writ ordered to issue accordingly. In the course of its opinion this Court said (289 U. S. 458):

"When construing the section, it is to be borne in mind that Congress has authority to direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf (*Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 27, *ante*, 588, 597, 53 S. Ct. 266) but **that Congress is not so empowered as to state officers.** The section is merely permissive; it does not require but merely authorized the court to order substitution in the cases covered. It extends only to suits 'relating to the present or future discharge of . . . official duties.' At least as to state officers it does not

purport to authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually." (Emphasis supplied.)

"Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it."

In a subsequent portion of the opinion (p. 459) the Court quoted from the opinion of Chief Justice Taft in *Gorham Mfg. Co. v. Wendell*, *supra*, to the following effect:

"The inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant, without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other."

To meet this decision plaintiffs, in the case at bar, filed motion for leave to file supplemental bill of complaint (Motion, Ex. "C") in which they alleged in general terms that successor Attorney-General Gibbs was continuing in the course of conduct of his predecessor Landis and was threatening to enforce, and unless restrained by injunction, would enforce the State statute complained of. Neither the motion nor the proposed supplemental bill tendered therewith gave any detail as to the time, place, or manner of making such threats, or to whom they were made.

In response to this motion the new Attorney General Gibbs, filed special appearance and objections with his own

supporting affidavit (Motion, Ex. "D", pp. 12, 13). That affidavit contains the following statement:

"\* \* \* I assert most positively and without qualification that I have never threatened to enforce said State statute or any provision thereof at any time, either against the plaintiffs in said suit or any other persons whomsoever, either upon the contingencies referred to in said supplemental bill or otherwise; nor am I now making such threats or any of them; nor have I directed or authorized any of the parties defendant to said cause to take or to threaten to take any such action against any person, firm, association, or corporation whomsoever."

It is submitted that the circumstantial and unqualified statements thus made by the present incumbent in the office of the Attorney General of Florida fully meet the reservation contained in *Ex parte LaPrade, supra* (289 U. S. 459):

"We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved."

The lower court correctly decided that it could not disregard these positive statements of the chief law officer of the State of Florida in favor of the general and loosely worded allegations of the motion for leave to file supplemental bill.

It should be noted in this connection that in *Ex parte LaPrade*, this Court in making the reservation quoted above gave no indication whatever as to the ruling it would make if the successor State officer had adopted the conduct of his predecessor.

No comfort may be had by the plaintiffs (here appellees) from the recent decision of this Court in *Allen v. Regents of the University System of Georgia*, 38 Sup. Ct. 980, — U. S.

—, 82 Law Ed. Adv. Op. 973, decided May 23, 1938. In that case it was the substitution of a Federal officer that was involved, not a State officer. In the portion of the *LaPrade* opinion quoted above the power of Congress to control such substitution of Federal officers was sharply contrasted with its lack of power to do so in the case of State officers. Moreover, in the *Allen* case, the answer of the successor officer did not deny the allegation that, unless restrained, he would continue in the course pursued by his predecessor. In these two respects the *Allen* case is amply differentiated from the one at bar.

### Conclusion.

In the preceding portion of this brief it has been demonstrated that the only person having power to institute proceedings looking to the enforcement of the statute challenged is the Attorney-General of Florida; that the only allegations made as to the conduct of the successor officer are vague and general allegations which have been met specifically in the affidavit of the present Attorney General of Florida denying that any steps have been taken by him or under his direction looking to the enforcement of the statute, and denying that any threats have been made by him or under his authority looking to that end.

Under these circumstances there is no basis for the substitution of Judge Gibbs as a party defendant, and the case, presenting only a moot question, should be dismissed.

Respectfully submitted;

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Assistant Attorney General  
of the State of Florida.

LUCIEN H. BOGGS,

ANDREW W. BENNETT,

Attorneys for Appellant State's Attorneys.

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CLERK

**IN THE  
SUPREME COURT OF THE UNITED  
STATES**

**October Term 1938**

**No. 276**

**GEORGE COUPER GIBBS (LANDIS), individually and as  
Attorney General of the State of Florida, et al.,  
*Appellants,***

**-vs-**

**GENE BUCK, Individually and as President of the  
American Society of Composers, Authors and  
Publishers, et al., *Appellees.***

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF FLORIDA.**

**BRIEF FOR APPELLANTS.**

**GEORGE COUPER GIBBS,  
Attorney General of Florida.**

**TYRUS A. NORWOOD,  
Assistant Attorney General  
of Florida.**

**LUCIEN H. BOGGS,  
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***Counsel for Appellants.***



## ERRATA

Appendix iv Under word "APPENDIX" insert—(The Statute involved in this suit) Laws of Florida, 1937, Vol. 1, p. 204, Chapter 17807.

### Brief Page

3 First paragraph, line 3, following "Vol. 1"—insert "page 204"

26 Citation to Dahnke Walker Co. v. Bondurant, should read: "257 U. S. 282"

39 Footnote, following "*Interstate Circuit, Inc. v. U. S.*"—"304 U. S. 55"

54 Bottom of page—name of case cited should read: "*Witmark & Sons v. Pastime Amusement Co.*"

68 Middle of page—italicized paragraph should be set in bold faced type as a sub-caption, thus

**"(1) (2) Section 1 does not constitute an unlawful interference with the Federal Copyright Act, but is a lawful exercise of the State's police power."**

74 Paragraph citing Ozan Lumber Co. case, line 5, word reading "provions" should read "provisions"

78 Sub-caption in bold faced type now numbered "(1)", should be numbered "(3)"

- 81 Sub-caption in bold faced type now numbered "(2)", should be numbered "(4)"
- 87 Sub-caption in bold faced type now numbered "(3)", should be numbered "(5)"
- 88 First line, word reading "attach"—should read "attack"
- 93 Sub-caption in bold faced type now numbered "(4)", should be numbered "(6)"
- 96 Strike out "*Wörthen v. Kavanaugh*, 295 U. S. 56" and substitute: "*Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558"
- 
- 109 Next to last paragraph, line 3—strike out letter "R." before word "see"
- 111 First paragraph, next to last line—record reference now "(R. ....)", should read "(R. 269)"







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IN THE  
**SUPREME COURT OF THE UNITED  
STATES**

October Term 1938

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No. 276

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GEORGE COUPER GIBBS (LANDIS), individually and as  
Attorney General of the State of Florida, et al.,  
*Appellants,*

-vs-

GENE BUCK, Individually and as President of the  
American Society of Composers, Authors and  
Publishers, et al., *Appellees.*

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF FLORIDA.

---

**BRIEF FOR APPELLANTS.**

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**OPINION BELOW.**

The Opinion of the United States District Court for the Northern District of Florida appears in the record at page 268. It is not reported in any official report.

**NOTE:** Italics in quoted matter in this brief are supplied unless otherwise indicated.

## JURISDICTION

Paragraph 1 of Rule 12 has been complied with and this Court has noted probable jurisdiction.

## STATEMENT OF THE CASE

In 1937, and for many years prior thereto, there existed in the State of Florida a deplorable situation affecting the users of copyrighted music for public performance for profit. The publishers of copyrighted music had combined with the renowned and outstanding authors and composers of music into combinations or associations for the express purpose of fixing prices (Articles of Association of American Society of Composers, authors and Publishers, R. 44) for the licensing of rights of public performance for profit of their copyrighted music. The users were subjected to various kinds of discriminations in the rates charged for the use of music by the combinations or associations. They were forced to buy all or none of the copyrighted music which the various combinations controlled or claimed to control. They could not deal directly with any separate copyright owner for the use of his music which that copyright owner might control, but all negotiations for the purchase of performance rights had to be carried on with the price fixing combination or association who forced the purchaser to purchase the right to use all the music which the combination controlled at a price fixed and determined by the combination, not by the copyright owner, although the prospective purchaser may have had no desire to use the music of more than one copyright owner. (For a more detailed statement of

these facts with supporting references to the Record, see Argument, Part II, *infra*.)

To remedy this situation, the Legislature of Florida adopted Chapter 17807 at the session of the Legislature of the State of Florida of 1937, Volume 1, General Laws of Florida 1937, a copy of which Act is printed as Appendix I to this brief. This Act provided that all price fixing combinations or associations which determined the amount of money to be paid to it, or its members, for the privilege of rendering privately or publicly for profit copyrighted music, were unlawful monopolies and prohibited them from licensing the right of public performance for profit of copyrighted music in the state for the reason that such licensing agreements were in restraint of trade.

The Act further provides that the selling price as determined solely by the owner for the use of music for all purposes, shall be affixed to the composition before it is sold in Florida. The Act expressly allows the copyright owner to fix and determine the price to be charged for the use of the individual copyrighted music in this State, provided they are not engaged in an unlawful combination, as defined in the Act. (Sections 2-A, and 2-B of the Act.)

Section 6 of the Act provides that whoever uses copyrighted music for public performance for profit in this State, and are affiliated with persons, firms or corporations outside of the State transmitting such copyrighted music, which originally emanated either by radio, sound production, instrumental or otherwise, that liability for the payment of the use of the copyrighted music shall rest exclusively on the party outside of the State send-



ing the music into the state. With these three Sections, viz.: 2-A, 2-B and 6, the defendants in this suit, are in no manner concerned, because there is no duty on these officers to enforce them. See Section 9 of the Act.

Criminal violations of the Act are dealt with in Sections 7-B and 8 of the Act; both of which are definitely tied up with the acts of unlawful combinations as defined in Section 1, and by no stretch of the imagination could these penal provisions be so enlarged as to comprehend the prosecution of anyone for anything done or left undone under Sections 2-A, 2-B or 6 of the Act.

The Florida Act became effective on June 9, 1937 and on February 7, 1938 there was filed a bill of complaint, (R. 1) supported by various affidavits (R. 76-201 incl.) praying for an interlocutory and permanent injunction, restraining the defendants from enforcing any of the provisions of the Act.

On the same day the bill was filed, there was also filed a motion for interlocutory injunction and a request to the District Judge to convene three judges to hear the application for interlocutory injunction, as provided by Section 380, Title 28 U.S.C.

On March 3, 1938, the defendants filed a motion to dismiss the bill on the ground that there was no equity in the bill; that the Court did not have jurisdiction because it affirmatively appeared that the jurisdictional amount necessary to give a federal court jurisdiction was not involved; that the suit did not appear to be one arising under any federal law in which the jurisdictional amount was not required to be shown; that it

affirmatively appeared that the Act, insofar as these defendants were charged with the duty of enforcing it, was a valid exercise of the police powers of the State to prohibit monopolies; that the plaintiffs had come into a court of equity with unclean hands, because it affirmatively appeared that they were a combination or monopoly violating both the federal and state laws prohibiting monopolies (R. 205).

The defendants also filed a motion to deny the plaintiffs' motion for interlocutory injunction, and supported this motion with various affidavits denying that the defendants had threatened to enforce the provisions of the Act, and showing how various persons in this state were discriminated against by the Society (R. 210-267, incl.)

The cause came on for hearing on the 3rd of March, 1938, on the motion for interlocutory injunction and a motion to dismiss the bill and motion to deny the motion for interlocutory injunction, and the Court, after considering the same, on April 4, 1938, entered an order granting an interlocutory injunction and denying the defendants' motion to dismiss (R. 270). This order was entered without the Court making any findings of fact or conclusions of law, as required by Equity Rule 70½, but was accompanied by a "Memorandum Opinion" (R. 268).

Thereafter, on the 25th day of April, 1938, the defendants perfected their appeal from the order granting the interlocutory injunction, filing their assignments of error, (R. 272) in which one of the assignments of error was to the effect that the Court erred in entering the order allowing the injunction without first filing the

findings of fact and conclusions of law, as required by Equity Rule 70½. After the appeal had been perfected and all papers filed therein the Court, on the 17th day of May, 1938, entered its Findings of Fact and Conclusions of Law. (R. 276). Thereafter the defendants amended their statement as to jurisdiction and assignments of error so as to recognize the filing of the document (R. 272; Statement as to Jurisdiction).

Not only were these findings belatedly filed, but they utterly failed to comply with the spirit of Equity Rule 70½, as interpreted by the decisions of this Court. See Part IV of this brief.

The appeal was then lodged in the Supreme Court of the United States, and it being made to appear to this Court by motion that the defendant, Cary D. Landis, as Attorney General, had died since institution of the appeal, this Court allowed the substitution of George Couper Gibbs, Attorney General of the State of Florida, and successor to Cary D. Landis, the former Attorney General, over the objection of Gibbs.

### **SPECIFICATION OF ERRORS INTENDED TO BE URGED.**

Appellants urge in this case that the Court below erred in denying defendants' motion to dismiss the bill for want of jurisdiction as a Federal Court (Assignments 1 and 3, R. 272); in denying said motion on the merits addressed to the want of equity in the bill in both assignments (Assignments 2 and 4, R. 272); in granting the temporary injunction without stating its findings of fact and conclusions of law, as required by

Federal Equity rule 70½ (Assignment 7, R. 273); in granting the temporary injunction without determining that the unconstitutionality of the statute was reasonably free from doubt (Assignment 8, R. 273); that the granting of the temporary injunction was an abuse of the discretion of the Court (Assignments 7, 9, R. 273); that the Court erred in not finding that the defendants were only charged with the duty of enforcing Section 1 of the statute and the Sections dependent thereon, viz: Sections 3, 4-A, 4-B, 5-A, 7-B, 8 and 9, that said Sections are valid enactments under the police powers of the state, and that the remaining Sections are without the scope of this suit (Assignment 10, A. 273).

## SUMMARY OF ARGUMENT

Appellants' contentions are as follows:

### I.

**The District Court as a Federal Court was without jurisdiction to take the case.**

Under this point of the Argument it will be shown that the requisite jurisdictional amount of \$3000, exclusive of interest and costs, is not involved in this suit; and further that while the suit is concerned with the public performance rights in copyrighted music, it is not one "arising under the \*\*\* copyright \*\*\* laws" of the United States, within the meaning of U. S. C., Title 28, Section 41(7).

### II.

**Even if the District Court had jurisdiction as a Federal Court, it should not have lent its injunctive aid in**

**the furtherance of the monopolistic power shown by the Record to be vested in the Plaintiff, American Society of Composers, Authors and Publishers.**

Under this point of the Argument it will be shown that the Society is composed of composers, authors and publishers of copyrighted music, each of whom for a period of years has transferred to the Society exclusive public performance rights on all copyrighted music owned or controlled by him; that the rights so transferred comprise a very large proportion of all copyrighted music used in the public entertainment industries of the United States including Florida; that the Society makes use of these rights to enforce upon the public entertainment industries of Florida a blanket license providing for the use of all copyrighted music in the Society's portfolio; that, at least as applied to the radio broadcasting industry, it enforces terms which are harsh and inequitable, and highly discriminatory against radio broadcasting stations not controlled by newspapers.

It will be further shown that the relief sought is directly for the purpose of enabling the Society to maintain its strangle hold upon the public entertainment industries; hence public policy dictates the refusal of such relief by a court of equity, without regard to the question whether, independent of the Florida statute here challenged, such combinations as the Society are forbidden by existing law, state or federal.

### III.

**All portions of the statute pertinent to the consideration of the instant case represent a constitutional exercise of the police power of the State of Florida.**



Under this point of the Argument it will be demonstrated that certain sections of the statute—the ones most attacked by the bill of complaint—viz., Sections 2-A, 2-B and 6, are removed from consideration in the instant case, because, with regard to these sections, no duties are imposed by the Act upon appellants, who, as the prosecuting officers of the State, were the only parties defendant to the action; that the District Court failed to recognize the inapplicability of these sections to the instant suit in its Findings of Fact and Conclusions of law, and this was a controlling factor in the issuance of the injunction. That other sections of the statute attacked by the bill, viz., Sections 7-A, 11-A, and 11-B, involve details of procedure in prosecutions under the Act, which, as there are no such prosecutions at the present time, it is premature to consider in the instant suit; that insofar as the remaining Sections of the Act are attacked by the bill, all such sections represent the constitutional exercise of the police power of the State, directed to the protection of its citizens from the activities of combinations attempting to monopolize public performance rights in copyrighted music.

#### IV.

**The District Court abused its discretion in granting the interlocutory injunction.**

Under this point of the Argument it will be shown that there was in the Record before the specially constituted District Court, when it granted the injunction, no showing of a reasonably grounded apprehension of irreparable injury, such as would justify the granting of the injunction; and further, that it does not persuasively appear from any findings of fact and conclusions of law

that the unconstitutionality of the statute is reasonably free from doubt; that in fact no findings of fact and conclusions of law were entered by the District Court until after the granting of the temporary injunction, and after the entry by the defendants below of appeal from such order.

## ARGUMENT

### I. THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION TO TAKE THE CASE. (Assignment of Errors 1 and 3).

#### A. No Jurisdiction has been Shown as to Appellee, American Society of Composers, Authors and Publishers.

Before entering into the argument of the point we call the Court's attention to Finding of Fact No. 4 (R 278). The Court finds that the jurisdictional amount involved is \$3000, exclusive of interest and costs, but it does not state how it arrived at that conclusion. And nowhere in the Findings is any reference made to the value of the appellees' business transacted in the State affected by the statute, the extent the statute affects the business, or the cost of operating the appellees' business in the State under the Statute and without the restrictions of the Statute.

The bill of complaint with its exhibits shows that American Society of Composers, Authors and Publishers, (hereinafter referred to as the Society) is an unincorporated association organized under the laws of the

State of New York (Bill, par. 1, R. 2). It is a non-profit organization (Bill, Ex. D. R. 61; Aff. Gene Buck, R. 77).

The money collected by the Society is devoted to the following purposes (R. 61):

#### "Apportionment of Royalties

Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half ( $\frac{1}{2}$ ) thereof to be distributed among the "Music Publisher" members, and one-half ( $\frac{1}{2}$ ) among the "Composer and Author" members respectively.

#### Reserve Fund

Section 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a por-

tion of the royalties as and when collected be placed in such reserve fund.

### Unclaimed Royalties

Section 3. Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society."

Therefore, if the Society were absolutely prohibited by the statute from doing any business in the State of Florida—which it is not if it ceases its price-fixing activities—it will suffer no loss because the loss, if any, would fall upon its individual members. *KVOS v. Associated Press*, 299 U. S. 269.

In the *KVOS* case a suit was brought in the District Court for the Western District of Washington to restrain a radio station from "pirating" news gathered by the Associated Press and published in the papers of its members, including three papers in the City of Bellingham. It was alleged that the Associated Press was a membership corporation organized under the laws of the State of New York, composed of proprietors or representatives of newspapers throughout the United States. Its business was the collection of news, and the distribution thereof to its members. The cost of the transactions amounted to many millions of dollars a year, and was

equitably distributed among the members of the Associated Press. In addition to these facts, there was a formal allegation that the amount in controversy exceeded \$3000.

The District Court found that it had jurisdiction (9 F. Supp. 279), but decided against the Associated Press on the merits of the action. The Circuit Court of Appeals reversed the District Court and granted a temporary injunction (80 F. (2d) 575). The case was then appealed to this Court, which held that proof as to the jurisdictional amount was insufficient to permit the Associated Press to maintain the action. This Court in its opinion, (299 U. S. 278-279) said:

*"The motion (i. e., defendant's motion to dismiss for want of jurisdiction) required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof. The only attempt to meet that burden is a reply affidavit filed on behalf of respondent, wherein it is deposed 'that the payments made by newspapers for said news sold to them by complainant in the territory served by said radio station is upwards of \$8,000 per month, which is being imperiled and jeopardized by the acts of defendant . . . by its unlawful and wrongful appropriation of complainant's news, and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and complainant is in danger of losing said member-*



ships and payments if defendant's practices in respect to pirating said news is not enjoined.' This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the \$8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and, as to any other damage they may suffer from petitioner's competition, the affiant is silent.  
 \* \* \* \* \* The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

This point was specifically raised in the instant case by the motion to dismiss (R. 206-7), and the lower Court erred in not dismissing the bill.

*Buck v. Case* 24 F. Supp. 541, (D.C. W.D. Wash., May 9, 1938) is a case on all fours with the case at bar. In that case the same Gene Buck who is plaintiff in the case at bar, as President of the Society, and other plaintiffs as in the case at bar, brought a suit to enjoin the operation of a statute of the State of Washington which, for purposes of federal jurisdiction, is identical with the Florida statute. A motion to dismiss for want of jurisdiction was filed by the defendant State officers. The three-Judge court, granting the motion to dismiss, said (p. 549):

"The non-profit sharing complainant Society, on behalf of whose members it is claimed the

Bill is filed, has not the requisite amount of pecuniary interest. *KVOS, Inc., v. Associated Press*, 299 U. S. 269-278, 57 S. Ct. 197, 200, 81 L. Ed. 183. The transfer to the Society by the members of their rights for such of the total (less expense) realized from the pooled license fees as a committee of the Society shall determine does not affect the pecuniary interest of the Society."

Appeal is now pending from that decision in this Court.

#### **B. The Jurisdictional Amount as to the Individual Appellees has Not Been Shown.**

The allegations of the bill of complaint with reference to jurisdiction as to the individual appellees may be summed up as follows:

That the Appellee, the Society, is an unincorporated society composed of approximately 1000 author and composer members, and 123 publisher members, who write, compose, and publish copyrighted music. (R. 16) That the suit is brought for and on behalf of the Society, by Gene Buck, its President, and by each of the individual Appellees. (R. 2) That the value of each of the publisher members' copyrighted music is in excess of \$1,000,000 (R. 9); that the publisher members of the Society each in 1936 collected over \$50,000 from the Society for licensing their work over the entire world. (R. 32); that the author and composer members named in the bill each collected more than \$5000 in 1936 from the Society for licensing their work over the entire

world (R. 32, 33); that the Society collects for 44,000 affiliated members from foreign countries (R. 21); that during the year 1936 the Society collected, for the use of music of its members and 44,000 affiliated members, from users of said music in the State of Florida, the sum of \$59,306.81 (R. 24); that it will cost the appellees in excess of \$10,000 to operate on a license for each individual piece of music as is required by the Florida law (R. 18).

It will be noted that there is no attempt to break down these figures to show how much each individual appellee received from the licensing of his particular works in the State of Florida. It is not shown what part of the sum of \$59,306.81 received from Florida licenses of the Society in 1936 went to the 44,000 affiliated foreign members. Further, the bill of complaint shows that the publisher, author and composer members have assigned to the Society all their rights to license the public performance for profit in copyrighted music. (R. 16). Thus it appears that the individual appellees have no cause of action at all.

The individual appellees are not prohibited from doing business in this State. They are only prohibited from entering into price-fixing agreements, and the requirement placed in the Act concerning the fixing of a price on each particular composition which covers the right of public performance for profit, and the provision of the Act relating to collecting from the person sending music into the State the license for public performance of the music in the State, are not in controversy in this case, because the appellants have no duties to perform regarding these particular provisions of the Act. But even if the Act independent of its price-fixing prohibition did impose a real burden on appellees, it

has not been shown what the burden would cost the individual appellees as compared to what it costs them now to operate under the present system. Without this essential allegation, the court had no jurisdiction, because in cases of this kind the jurisdictional amount is to be determined, not from the value or net worth of the business which the appellees transact in the State, but from the difference between operating under the burdens of the statute and operating relieved from the regulations of the statute.

In *McNutt v. Gen. Motors Acceptance Corp.*, 298 U. S. 178, the complainant sought to restrain the operation of a statute of the State of Indiana, regulating the purchase of installment contracts. In attempting to establish the jurisdictional amount, the complainant alleged the net worth of its business in Indiana to exceed \$50,000; that it had purchased \$7,000,000 worth of installment contracts in Indiana in the course of a calendar year, and that in the succeeding six months period, it had purchased \$4,000,000 worth. The bill further alleged that the corporation employed in Indiana employees whose aggregate salaries amount to \$150,000, and paid an aggregate office rental of \$13,147.

The complainant rested its allegation as to the jurisdictional amount on these facts, and the further fact that if the statute were put into effect, it would impair the efficiency of the operation and earnings of the complainant. It claimed that the jurisdiction was to be tested by the value of the object to be protected against interference. The Court held that the allegations set forth in the complainant's bill were insufficient to sustain the jurisdiction, and at page 181 said:

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference.

Hunt v. New York Cotton Exchange, 205 U. S. 322; Bitterman v. Louisville & Nashville R. Co., 207 U. S. 205; Berryman v. Whitman College, 222 U. S. 334; Glenwood Light Co., v. Mutual Light Co., 239 U. S. 121; Healy v. Ratta, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. *The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds \$3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

So far as the individual appellees are concerned, the bill of complaint can be searched from end to end without discovering any fact from which could be computed



or even inferred the amount received by any individual appellee from the licensing of copyrights owned by him in the State of Florida. In the absence of an affirmative statement as to the amount received by each appellee from the licensing of the public performance of his copyrighted works in the State of Florida, it is obvious that the allegations as to the cost or expense to the individual appellees in conforming to the statute, are insufficient to sustain the jurisdictional amount. In other words, there must be, facts showing first, that the object sought to be protected has a definite value; second, that the cost of conforming to the statute would reduce the value of the business or property affected by an amount equal to or in excess of the jurisdictional amount of \$3,000. To hold otherwise would permit the appellees having an interest of, say, only \$100 each in the subject matter under dispute, to invoke the jurisdiction of the Federal Court by alleging that the cost of conforming to the statute would be in excess of \$3,000. Such a result would destroy the jurisdictional requirement.

**C. Appellees Cannot Aggregate their Individual Losses in Order to Make Up the Requisite Jurisdictional Amount.**

There was no finding of fact or conclusion of law that the individual complainants had, or had not, the right to aggregate their alleged damages from the operation of the statute so as to comply with the jurisdictional amount, although this point was raised in the motion to dismiss. (R. 276-284 incl.; R. 206).

The rule has been reiterated countless times by the federal courts that the facts demonstrating the value of

the amount in controversy relating to each individual complainant must satisfy the jurisdictional amount, and that there can be no aggregation in order to secure jurisdiction. This rule is well settled in *Wheless v. City of St. Louis*, 180 U. S. 379, at page 382, where this Court, speaking through Chief Justice Fuller, held that separate landowners who sought to attack an assessment could not establish jurisdiction in the Federal Courts by aggregating their assessments.

“The ‘matter in dispute’ within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied or which may be levied, as against each of the complainants separately. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected or relieved in a certain sum, and not in the whole amount of the assessment. If a decision on the merits were adverse to the assessment each of the complainants would be relieved from payment of less than \$2,000. If the assessment were sustained, neither of them would be compelled to pay so much as that.”

The authorities on this point are exhaustively discussed in the recent case of *Dewar v. Brooks*, 16 F. Supp. 636.

As heretofore demonstrated in the brief, nowhere in the face of the bill can it be ascertained what amounts any of the individual appellees received from the licens-

ing of their works in the State of Florida. The record is entirely blank on this necessary amount. The same fault exists in the showing as to the Society. It affirmatively appears (bill, pa. 26, R. 24, 25) that the amount of \$59,306.81 received in 1936 from licenses to persons using the copyrighted music for profit in the State of Florida, includes not only the amount received by the Society on behalf of its members, but also the amounts received on behalf of all of the foreign authors, composers, and publishers, with whom the Society has working agreements. The bill fails entirely to allege facts showing that either the individual appellees or the Society, exclusive of the foreign groups which are not here parties complainant, received anything in 1936 from the licensing of public performance of their copyrighted works in this State.

The cause of action alleged by the Appellees in the bill of complaint is not a joint one. See *Buck et al v. Kloeppel*, reported in 10 Fed. Supp. p. 345, wherein Judge Strum said:

"Where copyright proprietors of musical compositions seeking injunction against future infringements of separate and distinct copyrights owned by them severally, in none of which the several copyright proprietors had any joint or common interest, were joined as plaintiffs with society suing as assignee to recover damages for past infringements of such copyrights, misjoinder of parties plaintiff resulted and bill was dismissible as multifarious (17 USCA § 25, 27; Equity Rules 26, 37, 38 (28 USCA § 723))."

See also the case of *Pope et al v. Blanton, County Judge, et al*, 19 F. Supp. pp. 15 and 18 respectively.

One of the writers of this brief drew the bill in this suit and in the first case attempted to show jurisdiction by alleging a joint cause of action. However, as the court will see from the opinion by the late Judge Bryan, the motion for interlocutory injunction was denied because no jurisdiction was shown, due to the fact that it was not shown that each defendant had suffered or did suffer the requisite jurisdictional amount of damages.

Thereafter, an amended bill was filed in which it was attempted to show jurisdiction by alleging a joint interest and the division of the profits by all the plaintiffs after sale of their sponges through the unincorporated sponge exchange. The allegation as to this particular feature is set out by Judge Long on page 19 of the opinion and is as follows:

“By the amended bill, plaintiffs undertake to show that property rights are involved; that the damages are irreparable, and that jurisdiction attaches in order to prevent a multiplicity of suits; that plaintiffs have large investments in boats and other equipment; that their boats and other equipment are used in gathering sponges by the method of diving; that the boats are of a value greater than \$3,000 each, that those other than the owners are employed on the boats; that they are dependent upon this employment for a livelihood; that their sales through the sponge exchange amount to some \$300,000 yearly; that the profits are distributed among them; that in excess of 50 per cent of the

sponges are gathered from 5 to 10½ miles off the shore of Taylor County; that off the shore of this particular county the sponges grow more rapidly and are more easily gathered than any other place; that because of the acts of defendants, plaintiffs will suffer irreparable damage unless defendants are restrained from enforcing the Florida statute prohibiting the taking of sponges by the diving method a distance of three leagues from the shore line."

Judge Long apparently thought that the plaintiff had shown jurisdiction and decided the case on the merits against them. However, when this case came to this Court, (299 U. S. 521), the decree of Judge Long was reversed, because the requisite jurisdictional amount had not been shown, the Court saying:

"The decree of the District Court is modified and the cause is remanded with directions to dismiss the bill for want of jurisdiction by reason of the absence of the requisite jurisdictional amount. *McNutt v. General Motors Corp.*, 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780; *KVOS v. Associated Press*, 299 U. S. 269, ante 183, 57 S. Ct. 197."

Certainly, if in the Pope case, *supra*, there was no jurisdiction for the federal court to decide the issues, there cannot be in this case. The mere fact that the suit is brought by Gene Buck as President of the American Society of Composers, Authors, and Publishers, does not make that society a party to the suit; but even if it did, still there would be no jurisdiction, because the Society, according to the allegations in the bill of complaint,



is an unincorporated, non-profit association, and according to the highly rhetorical affidavits filed in support of the motion for interlocutory injunction an eleemosynary one; thus, the society in itself, can suffer no loss. The loss would have to fall directly on the members thereof. This is indisputably settled by the case of *KVOS v. Associated Press*, supra.

In this aspect of the jurisdictional question, also, appellants' contention is directly supported by *Buck v. Case*, supra, the Court saying (pp. 549-550):

"Concerning the aggregating of the claims of the members of the complainant Society in determining the amount in controversy, neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown. It appears to be a part of the contention made by the defendants that such division is inequitable and to the advantage of those directly concerned with the management of the affairs of the Society. It also appears that such distribution may be of license fees secured throughout the country rather than from within the State. A common interest among the members warranting an aggregating of their claims for such purpose has not been shown."

#### **D. The Suit is Not One Arising Under the Copyright Laws.**

We again call the court's attention to the fact that the only sections of the Act with which these appellants are concerned are Sections 1 and its dependent Sections

3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9. The prosecuting officers have no duties to perform with respect to any of the remaining sections, that is, the sections that require the price of the music, including the right to publicly perform it for profit, to be affixed to the music before it is sold, and the section requiring persons transmitting music into the State where it is publicly performed for profit to pay all fees required by the owner thereof, and relieving the user of the music in this State from any liability for using the music in this State. There is no criminal liability imposed on persons violating Sections 2-A, 2-B, and 6, nor any civil liability with which the appellants in this case are charged with imposing or attempting to impose. Therefore, it is clear that with these sections of the law not under consideration, there is no question of copyright law involved in this suit. The suit does not involve the validity of any copyright or the infringement thereof, but merely rights incidental to the copyright laws, in that the property interest of the complainants is a creature of such laws as in *Albright v. Teas*, 106 U. S. 613.

For further discussion of this question, see Point III, Division C (1) (2) of this brief.

### **E. The Claim that the Statute Violates Foreign Treaties Presents no Substantial Federal Question.**

In so far as the plaintiffs, allege a violation of treaty rights (bill, par. 24, R. 21, 33), by reason of mutual working arrangements with foreign society of composers and authors, suffice it to say that the plaintiffs cannot, because of these mutual working arrangements with foreign societies, claim any violation of *their own*

treaty rights. If there is any conceivable violation of a treaty right, it is a violation of a treaty right of a foreign composer or author, and not of plaintiffs.

If any point of constitutional law is settled, it is that one cannot raise constitutional questions for other persons.

*Heald v. District of Columbia*, 259 U. S. 114;  
*Arizona Copper Co., v. Hammer*, 250 U. S.  
 400;

*Walker v. Gish*, 260 U. S. 447;

*Lehon v. Atlanta*, 242 U. S. 53;

*Oliver Iron Mining Co., v. Lord*, 262 U. S. 172;

"The federal right claimed to raise a federal question must be that of the plaintiff and not a third person."

*Simkins Federal Practice*, (1934) Sec. 458, p. 401 and cases cited.

One can only raise a constitutional question where and to the extent that he is personally affected by the application of the statute or some section thereof.

*Heald v. District of Columbia*, 259 U. S. 114;  
*Dahnke Walker Co., v. Bondurant*, 257 U. S.  
 283, 289;

*Panama R. Co., v. Johnson*, 289 Fed. 964; affirmed 264 U. S. 374;

*Yazoo & Miss. R. Co., v. Jackson Vinegar Co.*, 226 U. S. 217;

*Oliver Iron Mining Co., v. Lord*, 262 U. S. 172.

The principle is succinctly stated in *Dahnke-Walker Co., v. Bondurant*, 257 U. S. 282, 289, as follows:

"Besides, a litigant can be heard to question

a statute's validity only when, and so far as, it is being or is about to be applied to his disadvantage."

The underlying reason for the above rule is that courts are loathe to pass on constitutional questions and will do so only where absolutely essential, and only at the instance of one who is injuriously affected by the application of the alleged unconstitutional act under a state of facts absolutely requiring a decision on the constitutional question, and then only to the extent that the state of facts alleged requires such a decision. A court will not pass on the validity of any section of a statute, where the facts before it do not inescapably require a decision on such section; but will pass by such question until facts are presented requiring a decision.

*Blair v. United States*, 250 U. S. 273, 279;

*Massachusetts v. Mellon*, 262 U. S. 447, 488.

Under the foregoing rules, nearly all of the questions raised in the complaint fall by the wayside, and cannot be raised in this case.

And certainly the Society's claim based on the treaty rights of others with whom it has "mutual working arrangements" presents no substantial federal question, vesting a federal court with jurisdiction of this cause to determine such question.

## II. THE COURT SHOULD NOT LEND ITS AID IN THE FURTHERANCE OF THE MONOPOLISTIC POWER OF THE PLAINTIFFS. (Assignment of Error 2).

In view of the monopolistic power which the record discloses is vested in the Society, even if the Court be-

low had jurisdiction as a Federal Court to entertain this case, and even if the Federal Anti-Trust Acts, the Anti-Trust statutes of the State of Florida (Laws of Florida 1915, Vol. I p. 281 amended by Laws of Florida 1925, Vol. I p. 517) and the statutes now under consideration do not prohibit the Society from maintaining this suit, still under the rule of public policy against monopolies, the District Court should not have lent its equitable aid to further the monopolistic powers of the Society. The maxims: "He who comes into equity must come with clean hands" and "*ex turpe causa non oritur actio*", should govern.

The thought is that what the plaintiffs seek in this case is the aid of the court in fastening permanently upon the State of Florida the strangle hold which already they have acquired upon all entertainment industries dependent on copyrighted music. Appellants expect here to show:

(A) That the Society as now constituted is a price-fixing, combination operating in restraint of trade.

(B) That public policy demands it be not aided in maintaining the monopoly it now enjoys.

#### **A. The Plaintiff Society is a Price-Fixing Combination Operating in Restraint of Trade.**

At the present time there are approximately 123 publisher members of the Society, and approximately 1,000 writer and composer members (bill, par. 17, R. 16), and an additional 44,000 composers, authors, and publishers, who are represented by the plaintiff Society by virtue of its agreements with foreign societies (bill, par. 20, R. 18) all of whom bound themselves together for



the declared purpose of fixing prices for the right to publicly perform their music for profit (R. 20). A "vast reservoir" of copyrighted musical compositions is thus created (ibid.), and the sale or licensing of the right to publicly perform those compositions is concentrated in the Society, thereby suppressing all competition between the respective copyright owners.

It is important to note that with rare exceptions the copyright owner of musical compositions is the publisher and not the composer and author. The Bill of Complaint specifically alleges with respect to each of the individual plaintiffs that the copyrights have been vested in the publishers (bill, par. 8, R. 8; par. 9, R. 9; par. 10, R. 9; par. 11, R. 10; par. 12, R. 11; par. 13, R. 12; par. 14, R. 13). Moreover, Exhibit "A" attached to the bill (R. 36) expressly transfers all rights, including performance rights, to the publisher and we must accept that exhibit as being representative of all agreements between composers and authors and their respective publishers. Consequently the plaintiffs' repeated reference to composers and authors in such manner as to imply that they are now the copyright owners should be totally disregarded. The legal rights of composers and authors are limited to rights for an accounting.

On or about March 4, 1930, plaintiff Gene Buck, appeared before the Committee on Patents, House of Representatives, 71st Congress, Second Session, in connection with Hearings on HR 9639, a Bill to amend the Federal Copyright Act, and amongst other things stated: (Hearings before Committee of Patents, page 5.)

*Mr. Buck.* . . . In former times they have told you about the American Society—a terrific,

monopolistic chimera that was just going to take the Victor Co., and the motion picture industry right out of business. Let us put the cards on the table and see what the American Society is. *The American Society is an organization which consists of all the authors and composers, and their publishers in America* brought together because in the year 1914 my dear beloved friend, Victor Herbert, found that a restaurant on Broadway was taking one of the numbers from his opera; having a person in costume come out with an orchestra and sing his song without asking Herbert's permission, and making a covert charge. \* \* \*

In March of 1932, the plaintiff Buck, as President of the plaintiff Society, at page 213, Hearings before Committee on Patents, 72nd Congress, First Session, HR 10976, a Bill to amend the Copyright Act, made the following statement to the Committee on Patents in contradiction of a statement made by Mr. Frank Boland, Counsel of the American Hotel Association:

*"Mr. Boland: The American Society of Composers, Authors and Publishers, I believe—I may be wrong—does not control much more than one-half of the popular music.*

*The Chairman: Why, Mr. Buck told me they control 95 per cent.*

*Mr. Buck: The copyrighted works.*

*The Chairman: Can you prove that to me?*

*Mr. Buck: Yes.*

The management of the plaintiff Society is vested exclusively in a self-perpetuating board of directors, con-

sisting of twenty-four persons, twelve of whom represent publishing members, six represent composer members, and six represent author members. Each director is elected to served for a period of three years, and is eligible for re-election upon the expiration of his term. The terms of office of eight members of the board expire each year, and their successors are elected annually by the remaining members of the board. The directors have exclusive and absolute control of the management and of all activities of the Society, and appoint all committees, officers, and employees (bill, Exhibit D, "Articles of Association", Art. IV, Sec. 1, and Art. V. Sees. 1 and 2; R. 52, 53).

It may be readily seen from the foregoing that the power of plaintiff Society for good or evil is in the hands and under the domination of twenty-four individuals whose election to the board is not dependent upon the vote of the membership of the Society, but upon the vote of their fellow directors.

Amongst the powers of this self-perpetuating board of directors is the power "to fix the rate, time and manner of payment of royalties for the performance of all works registered with the Society." (bill, Exhibit D, "Articles of Association", Art. V, Sec. 2; R. 53, 54).

The plaintiff Society issues to businesses using music only blanket licenses conferring upon the user the right to publicly perform for profit, all of the copyrighted musical compositions in the vast reservoir pooled in the Society. (bill, par. 20, R. 18; par. 23, R. 20) and the single license fee is "fixed and determined by the Society". (bill, par. 23, R. 20).

That this power can be and is used by the plaintiff Society to discriminate between competing businesses requiring the performance of copyrighted musical compositions for their continued existence is clearly demonstrated by the provisions of the form of contract granted to radio broadcasting stations owned and operated not less than 51 per cent by a newspaper (Contract of Radio Station WDAE attached to affidavit of L. S. Mitchell, R. 243). It is not surprising that the plaintiffs neglected to attach the form of this contract as an exhibit to their complaint; and that they neglected to state in the voluminous affidavits in support of their motion for a preliminary injunction the number of such discriminatory contracts which they have issued.

A comparison of Radio Stations WFLA and WDAE (see Affidavits of W. Walter Tison, R. 212, and L. S. Mitchell, supra,) both located in the City of Tampa, Florida, discloses that each station operates on the same power, caters to the same potential listening audience, and that each competes with the other for the radio advertising business of Tampa and environs. Yet Radio State WFLA is compelled by the terms of its license agreement to pay 5 per cent of its gross income derived from the sale of its facilities, whereas Station WDAE only pays the percentage of its income on such as is derived from musical programs using copyrighted music controlled by the plaintiff Society. Moreover, even this percentage is not 5 per cent, but is 3 per cent on the first \$25,000 of income derived from programs using Society music and 5 per cent on the income above that amount derived from such programs.

Accepting as true for the sake of this discussion Mr. Buck's very elaborate description of the efforts of radio

broadcasters to combat the demands of the Society, the mere fact that the Society is able to discriminate between the only two radio stations in Tampa is glaring testimony to the monopolistic price-fixing power vested in the plaintiff Society by the mutual contracts of its members.

Further testimony of this power is disclosed by the affidavit of W. Walter Tison and by the complete "Report on Copyright" of the National Association of Broadcasters, dated February 12, 1936, quoted in part by plaintiff Buck in his affidavit (R. 90). (See complete "Report on Copyright" attached to affidavit of W. Walter Tison, R. 217). This report discloses that on January 1, 1936, the music publishing companies Harms, Inc., Remick Music Corporation, M. Witmark and Sons, and several others, all owned by Warner Brothers Picture Corporation, withdrew from membership in the plaintiff Society with the intention of independently licensing public performance rights in the musical compositions owned by them. The report discloses that prior to January 1, 1936, approximately 40 per cent of the copyrighted musical compositions performed by broadcasting stations were controlled by the Warner subsidiaries. Nevertheless in spite of the loss of this large quantity of copyrighted music, the plaintiff Society refused to reduce the license fee demanded by it for the copyrights remaining under its control; and the broadcasting stations, in spite of their efforts to avoid doing so, were compelled to accede to the demands of the Society and accept the depleted repertory of the plaintiff Society at the same price which should have been paid for the complete repertory. The attempt of the Warner subsidiaries to operate independent of the plaintiff So-



ciety apparently failed since they rejoined the Society on August 1, 1936.

The fact that no radio station or other user of music has been able to obtain a complete or even substantially complete catalogue of the copyrighted musical compositions coming under the plaintiff Society's license (Aff. of W. Walter Tison, R. 215) places the burden of determining the ownership of a copyrighted composition upon the user. Such being the case, the license agreement between the plaintiff Society and the user really amounts to no more than an agreement not to sue the user for infringement. Checks of copyrighted musical compositions entered by the members of the plaintiff Society and by the members of foreign Societies affiliated with plaintiff Society in the office of the Register of Copyrights, Washington, D. C., indicate that approximately 60% of all published copyrights in the United States are under the control of the Society. Manuscripts, as distinguished from published copyrights, are not generally available to a user of music for public performance purposes since manuscripts are not offered for sale. Therefore, they do not become available for the use of the general public until such time as they are published. (Aff. of W. Walter Tison, R. 215). The total published copyrights between January 1, 1909 and December 31, 1936 represent approximately 508,000 plus an additional number of renewals during the same period of 60,682 (Photostat copy of Certificate of Register of Copyrights attached to Affidavit of W. Walter Tison, R. 241). Consequently it appears that the plaintiff Society probably controls the performance rights of between 350,000 and 400,000 copyrighted musical compositions.

This overwhelming array of uncontradicted facts proves the monopolistic activities of the Society in respect of the very matters it has put in litigation by its bill of complaint. All of it was before the Court, but was completely ignored in its Findings of Fact and Conclusions of Law (R. 276-284). If the Court had considered these facts it is difficult to believe that it would have given equitable relief to the plaintiffs.

Not only does the state have power to regulate the use of a federal copyright within the state, such regulation being in no way prevented by the federal copyright laws, but it must also be borne in mind that the federal copyright laws are not intended to and do not sanction every conceivable practice in which the owners of such copyrights or combinations of owners of such copyrights may seek to engage.

The Florida statute challenged by plaintiffs primarily is directed at monopoly and monopolistic practices of the owners of copyrighted musical compositions. It is a regulatory statute which prescribed the "rules" under which the property right may be sold within the State of Florida. It does not deny the existence of the property right nor does it destroy that property right.

The copyright Act of 1909 does not give the copyright owner the right to control or dominate business dependent upon the public performance of a large quantity of music for existence. It gives to the copyright owner only the right to control and dominate the use of the individual musical composition covered by the individual copyright. It gives no right to impose restrictions or limitations upon the use of other musical compositions. It gives no right to combine with other copyright owners

for the purpose of increasing the power of the individual monopoly created by the copyright in the individual copyrighted musical composition. If such right to combine with other copyright owners were created by the Copyright Act, then a combination of a sufficient number of copyright owners would have the right to take over or prevent others from engaging in any and all businesses which are dependent upon music for their economic existence. If the owners of copyrights may lawfully combine at any time and lawfully enforce their collective demands upon such businesses, then the legislature of a state can do nothing to protect its citizens from such combinations.

We are dealing here with a combination of conditions, with interlocking restrictions imposed by a powerful group of copyright owners, and not with legal and reasonable conditions imposed independently and in the normal and usual course of business by the owner of one copyright upon the use of the individual musical composition covered by that copyright.

The cases in which the question as to whether property rights created by statute may be pooled by the individual owners of such rights have principally arisen in connection with patents. However, the Supreme Court has definitely determined that the monopoly created by the Copyright Act is no more extensive than that created by the Patent Act. In *Straus v. American Publishers Association*, 231 U. S. 222, at pages 234-235, Mr. Justice Day says:

“So in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than

that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies."

In view of the express language of the Court in the Straus case, the question of the right to pool the individual property rights created by the patent statute or the copyright statute is identical, and the decisions involving patents are applicable to the situation under discussion.

In *Standard Sanitary Manufacturing Co., v. United States*, 226 U. S. 20, 49, it is stated:

"\* \* \* Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

In *Virtue v. Creamery Package Mfg. Co., and the Owatonna Mfg. Co.*, 227 U. S. 8, it is stated by Mr. Justice McKenna (p. 32):

"Of course patents and patent rights cannot be made a cover for a violation of law, as we

said in *Standard Sanitary Manufacturing Company v. United States*, 226 U. S. 20."

In *National Harrow Co., v. Hench*, 83 F. 36, 38, a suit involving the right of the manufacturers of float spring tooth harrows to assign all their patents to the National Harrow Company, the Circuit Court of Appeals for the Third Circuit, said:

"The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interest and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage."

In *Standard Oil Co., (Indiana) et al v. United States*, 283 U. S. 163, 174, Mr. Justice Brandeis used the following language:

"Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product,



is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. *The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition."*

The most recent decision on the subject of the concerted action of a group of copyright owners is contained in *United States v. Interstate Circuit, Inc., et al*, 20 F. Supp. 868, 872, 873, 874, 875.\* This was a suit instituted by the United States against the above named defendants and the principal moving picture producers and distributors to enjoin certain provisions of the exhibition contracts entered into by the owners of the two theatre chains and the producers and distributors. The defendants contended that the subject matter of the contracts consisted of copyrighted motion picture films and that they had certain rights as copyright owners. The following language of Judge Wm. Howley Atwell clearly states the limitations imposed upon copyright owners in the licensing of the property right created by the Copyright Act, and the rights of individuals dealing with such copyright owners:

"It must be conceded that since films are copyrighted, the owner thereof has the right, under our laws, to exhibit them, or, to license their exhibition, at such prices, or in such manner as

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\*Remanded by this Court with directions to District Court to state its Findings of Fact and Conclusions of law as required by Equity Rule 70½ (*Interstate Circuit, Inc., v. United States* ..... U. S. ...., decided April 25, 1938).

to him may seem appropriate. This well defined right, however, will not justify his agreeing, or, combining with another person in order to deprive a third person of a complete freedom of contract. The copyright statute \* \* and the anti-trust statute \* \* are both in effect and vitally necessary. *Straus v. American Publishers Ass'n.*, 231 U. S. 222.

\* \* \* \* \*

*"The citizen has the right to go to another citizen to make a contract and to have that other citizen free from any inhibiting prior agreement to limit the rights of him who seeks. The subsequent small theatre exhibitor who wanted the right to show a class A film at ten or fifteen or twenty cents, has a right—that right which belongs to every free man—to contract with the owner of that film, free to exercise his own judgment. This evidence shows that no such subsequent run exhibitor had a field of that sort with the distributor defendants. There had already been a pre-occupation of this very field of agreement. Some of his rights had already been taken away from him. It differs from the exercise of the distributor of the right to refuse to deal at all."*

Applying Judge Atwell's language to the situation under consideration, every business in the United States performing copyrighted musical compositions for a profit is entitled to go to every copyright owner and make a contract with that copyright owner individually, and that copyright owner should be free from inhibiting

prior agreements which limit the rights of the user who seeks to deal with him. Under the mutual agreements entered into by the members of the plaintiff Society, the Society is vested with the exclusive right to license the copyrights of all its members. As heretofore pointed out, the bill admits that the Society issues only a blanket license at a fee fixed and determined by the Society acting in behalf of all of its members.

"Price-fixing" is the classic example of violations of anti-trust laws, both federal and state. It may reasonably be said that almost without exception it is the basic purpose behind combinations which create dictatorial powers by pooling their respective properties. Plaintiff Gene Buck admits that license fees are "fixed and determined by the Society, acting on behalf of all its members and members of affiliated societies" (Buck Aff., R. 77) and that only blanket licenses covering all the copyrights of the Society's members and affiliates are issued. The user is required to buy the right to perform the entire repertory of all the members and affiliates of the Society at an annual fee fixed and determined by the Society and is not permitted to acquire the right to perform merely those copyrights which are required in his business. The fact that these prices so fixed and determined by the Society have been impressed upon every broadcasting station and motion picture theatre in Florida and upon hotels, dance halls, night clubs and other businesses in the state in spite of the efforts to resist, so eloquently described by plaintiff Buck and others in their affidavits herein, is convincing testimony of the power to dominate which has been concentrated in the Society.

Indeed it has come to be recognized that where price fixing exists in what normally would be a competitive market, no further proof of monopoly is necessary. That the price actually fixed is reasonable is not a defense since it is the *power* to fix prices which constitutes the monopoly, and it necessarily includes the power to control and dominate, since it logically follows that if the group does not have the power to control and dominate, then it could not have the power to fix prices.

The fullest enunciation of this doctrine by the Supreme Court is found in *United States v. Trenton Pottery Co., et al*, 273 U. S. 392. In that case, it was denied that there was sufficient evidence that the defendants had combined to fix prices and to limit sales in interstate commerce. It was urged "that the court below erred in holding in effect (1) that the trial court should have submitted to the jury the question whether the price agreement complained of constituted an unreasonable restraint of trade; \* \* \*". The trial court had urged that the jury "might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of combining units \* \* \*" and refused requests that the acts done did not constitute violations "unless it was also found that they unreasonably restrained interstate commerce". Against the argument that the "rule of reason" should be applied, the trial court had instructed the jury that " \* \* \* the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; \* \* \*". In the Circuit Court of Appeals the judgment of the District Court was reversed, but in the

Supreme Court the Circuit Court of Appeals was reversed, and the charge to the jury by the trial court sustained. The Court observed that in the *Standard Oil and Tobacco* cases a requirement that restraints be "unreasonable" was laid down, and then continued:

"\* \* \* But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by statute, merely because the prices themselves are reasonable (396).

"\* \* \* The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices (397-398).

"\* \* \* It has since often been decided and always assumed that uniform price fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon (398)."

This case was approved in *Standard Oil Co., v. United States*, 283 U. S. 163, 169, and again in *Appalachian Coals, Inc., v. United States*, 288 U. S. 344, 375. In the latter case, the Court referred to its decision in the *Trenton Potteries* case and said:

"It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved 'power to control the market and to fix arbitrary



and unreasonable prices', and that in such a case the difference between legal and illegal conduct could not 'depend upon so uncertain a test' as whether the prices actually fixed were reasonable,—a determination which could 'be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies' ”.

In an unreported decision of Judge August Hand in the Southern District of New York in the case of *United States v. Consolidated Music Corp., et al*, (decided February 27, 1922) it was held that an agreement of six music publishers requiring the manufacturers of music rolls to use two of the compositions of each of the six each month in manufacturing rolls for player pianos, paying therefor an established price of 12 cents per word-roll, was a violation of the Sherman Law. It was found that these six publishers controlled one-fourth of the substantial publishing business in that type of music, and the Court said:

“ \* \* \* The fixing of a minimum of 12 cents was in itself a violation of the Sherman Act.

\* \* \* Such an arrangement was in my opinion a sufficient restraint of competition to be unreasonable under the general rules laid down by the Supreme Court in construing the Sherman Act.”

(Note that “unreasonable” is applied to restraint of competition and not price fixing.)

That the power to fix royalties is tantamount to the power to fix prices was definitely decided by the Supreme Court in 1931 in *Standard Oil Co. (Ind.) et al v. United*

*States, supra.* This was a suit involving the rights of the owners of the Standard Oil Company of Indiana, the Texas Company, the Standard Oil Company of New Jersey and the Gasoline Products Company to pool their respective patents covering the production of gasoline by the "cracking" process. It was claimed by the defendant that their patents were overlapping and that their sole object was to avoid litigation and losses incident to conflicting patents. Although the ~~Supreme Court~~ ultimately found that no monopoly or power to effectively control prices resulted and therefore that the Sherman Act was not violated; it nevertheless passed upon certain other defenses and upon certain other contentions, restating rules for determining questions of violation of the Sherman Act. Among these rules is that pertaining to the power of combining potent owners to fix royalty rates as being tantamount to the power to fix prices. On page 174 of the opinion, Mr. Justice Brandeis stated:

"The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices."

With specific reference to this power to fix and maintain royalties and the fact that such power is tantamount to the power to fix prices, Mr. Justice Brandeis says in Note No. 9 at the bottom of page 174:

"Where the royalty demanded is a fixed percentage of the gross sales price, this relationship is clear."

It is submitted that the foregoing is on all fours with the situation under discussion. The mere fact that the combining copyright owners in the Society have actually impressed upon the radio industry their demands for a fixed percentage of the gross income of the station (less advertising agency commissions) which gross income represents the sales price of time on the air for advertising or other purposes, is conclusive evidence of their power to dominate industries dependent upon music for economic existence and is conclusive of the fact that by combining their performance rights they have created in the Society the power to fix and maintain royalties, i. e., the power to fix prices.

The bill and the affidavits filed in support of the motion for a temporary injunction, while purporting to attack the constitutionality of the Florida Statute, really constitute to a considerable extent a plea in avoidance of the monopolistic price-fixing practices engaged in by the plaintiff Society. The plaintiff Buck in his affidavit in support of the motion for the preliminary injunction describes attempts of users, both organized and unorganized, to combat the collective demands of the Society. The mere fact that such attempts have uniformly failed over a long period of years is eloquent testimony of the power concentrated in the defendant Society and the domination which it can exercise over entertainment industries by reason of its price-fixing activities.

Undoubtedly the Society engages in lawful activities such as policing for the purpose of detecting infringements. Undoubtedly the blanket method of licensing at an annual fee "fixed and determined by the Society" is the easiest and simplest method for the members of

the Society to function, but such a method contravenes anti-trust legislation, and the public policy which lies behind it.

It may well be that through its 23 years of experience the Society has evolved that method of operation which is most efficient and to it most desirable. It might be assumed for the purpose of argument that its manner of operation is that which most benefits both producers and users of music. Nevertheless, speaking with respect to Federal legislation, Congress has decreed through a monopolistic pooling, there is a violation of law, and arguments about efficiency and benefits are of no avail. State legislatures have decreed the same.

In *Eastern States Retail Lumber Dealers' Assoc., v. United States*, 234 U. S. 600, 613, the Court was confronted with an agreement providing for the distribution of trade information. In holding that there was a violation of the Sherman Law, it said:

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242."

To like effect see *Duplex Printing Press Co., v. Dear- ing et al*, 254 U. S. 443, 467-468.

Thus the Supreme Court has held that acts which violate the provisions of the Sherman Law may not be justified because of economy or intended benefit in particular cases. It is no defense to the Society, if in fact it is violating the Anti-Trust Laws, or the public policy which stands behind those laws, to say that its method of operation is expeditious as far as it is concerned and beneficial as far as others are concerned.

And it cannot be successfully argued that experience has demonstrated that, despite possible conflict with Anti-Trust Laws, the plan of operation now in effect is the only practicable one. *United States v. Great Lakes Towing Co.*, 208 F. 733 (C.C.A. 6). In that case, Circuit Judges Warrington, Knappen and Dennison, of the Sixth Circuit, holding the Great Lakes Towing Company a combination in violation of the Anti-Trust Act, said in part, on page 744 of the opinion:

"The fact that the towing and wrecking service has been improved under the towing company's administration cannot legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the Anti-Trust Act (*Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; 33 Sup. Ct. 9; 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods."

It is elementary that the lawfulness or unlawfulness of a combination does not depend on the motive or primary intent of the parties forming it when the question involves a result already accomplished by the activities



of the combination. Good motives and good primary intent in such cases are not legal defenses, otherwise the Anti-Trust Laws would in fact be a nullity. The law presumes that the members of the combination intended the result accomplished and the Supreme Court has long since set at rest any thought to the contrary.

*Standard Sanitary Mfg. Co., v. United States*,  
226 U. S. 20;

*United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 340;

*Anderson v. Ship Owners Association of Pacific Coast*, 272 U. S. 359, 400;

*Thomsen v. Cooper*, 243 U. S. 66, 86;

*Bedford Cut Stone Co., v. Stone Cutters Assn.*, 274 U. S. 37, 55.

#### **B. Public Policy Demands that the Court Give no Aid to Plaintiffs in the Present Suit.**

The principle for which defendants here contend is based on the maxim that "he who comes into equity must come with clean hands." The situation here fits the limitation of the rule as stated in 1 *Pom. Eq. Jur.* (3d Ed.) Sec. 399:

"The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies; is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations

subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern."

It is freely conceded that even those attempting to perpetuate a monopoly do not thereby become general outlaws to such extent that they may not have recourse to courts of justice. In numerous cases the courts have permitted such monopolistic combinations to recover on contracts which do not form a part of the monopolistic plan. In the case at bar, however, it is self-evident that the relief sought is for the express purpose of perpetuating the monopolistic plan under which the plaintiffs now operate. In fact the bill has no other object. In the court below, far from disputing this statement, plaintiffs asserted in their brief (p. 22):

"In the case at bar the injury to the collective rights of the complainants is undisputed, certain and inevitable. *The Society must abandon all its contracts with its licensees in the State because they are expressly declared unlawful and are nullified by Section 3 of the Statute.*"

The equitable maxim is directly applicable to one who invokes the aid of a court of equity in enforcing or protecting an agreement in unreasonable restraint of trade or tending to monopoly. 1 *Pom. Eq. Jur.* (3d Ed.) Sec. 402, citing:

*American Biscuit Co. v. Klotz*, 44 F. 721;

*Pacific Postal Tel Cable Co. v. Western Union Tel Co.*, 50 F. 493;

*Chicago Gas Light Co. v. Gas Light Co.*, 121;

Ill., 530, 13 N. E. 169, 2 Am. St. Rep. 124.

In *American Biscuit & Mfg. Co. v. Klotz*, supra, Klotz had sold his bakery in New Orleans to American Biscuit Co., in exchange for stock of the company. Under the agreement Klotz became manager of the plant. Charging that certain frauds had been perpetrated upon him with regard to the stock paid for his sale of the plant, Klotz repudiated the contract and held possession of the bakery adversely to the Biscuit Company, excluding them from the premises. The Biscuit Company brought suit for injunction and receiver. Klotz defended by answer and cross bill asking for rescission of the contract.

After announcing that the equities for the appointment of a receiver under such circumstances ordinarily would be with the plaintiff, the Court declined to do so (p. 723) because of:

"\* \* \* an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties."

The court then points out that the evidence discloses an "attempt to monopolize" within the meaning of the Federal and Louisiana statutes against monopolies (p. 725), and that:

"Aside from this the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right but of judicial discretion."

Because of these considerations the Court denied the appointment of a receiver.

This case was never appealed, but it has been frequently cited, and in *McConnell v. Camors-McConnell Co.* (C.C.A. 5, 1907), 152 F. 321, the syllabus of the Klotz case is quoted and the holding followed.

In the *McConnell* suit *supra*, the Circuit Court of Appeals denied to the plaintiff (a subsidiary of United Fruit Co.) the right to judicial aid in enforcing a contract, the purpose of which was to aid in bringing about a monopoly of foreign commerce in tropical fruits. In a strongly worded opinion by Circuit Judge McCormick, the Court said (p. 332):

"The state may and will bring, in its courts, actions and suits to enforce its statute laws and its public policy against them, when necessity requires, to the extent that time and opportunity permit. But the harvest is great, the laborers are few, and time is short. These parties are wonderfully strong. Age does not impair their strength. They perennially recruit it from the highest ranks of the legal profession, with veteran experts in strategy and tactics, both grand and elementary. There are necessary delays in litigation, inherent weaknesses in its best machinery, obstructions will supervene, and all these elements are capitalized to the last extent, of their earning capacity, by these highly organized unnatural persons, who decide and act with the promptness and prescience of the most superior human intellect. Direct proceedings by the state are overtaxed. The courts, especially

the courts of equity, should not pose always as the fabled goddess, but keep an eye single to these exigent conditions and aid the state, as they rightly may, by withholding help or grace from graceless and hurtful dealings."

In *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* (C.C.A. 6, 1906) 148 F. 939, plaintiff sued for money due for wall paper sold and delivered to defendants. The appeal was based on the action of the trial court in sustaining against demurrer a special defense that "the goods sued for were sold to it under certain agreements in aid of restraint of trade. In sustaining the ruling of the lower court, the opinion (by Judge Lurton, later Mr. Justice Lurton of this Court) said (p. 950):

"The defense which we sustain here is not for the sake of William Voight & Sons. The averment that they paid 50 per cent. more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public. There, at last, like all burdens, it must rest. The defense here sustained is good only because it is only possible to protect the public by refusing all assistance in carrying out an illegal agreement."

This decision of the Circuit Court of Appeals was affirmed by this Court, 212 U. S. 227. The Court, speaking through Mr. Justice Harlan, said (p. 262):



"In such cases the aid of the court is denied, not for the benefit of the defendants, but because public policy demands that it should be denied without regard to the interests of individual parties."

To like effect see *Chicago, M. & St. P. Ry. Co. v. Wash, St. L. & P. Ry. Co.* (C.C.A. 8, 1894); 61 F. 993.

In *McMullen v. Hoffman*, 174 U. S. 639, two bidders for a municipal contract had secretly agreed that while ostensibly putting in separate bids, if either were awarded the contract, its benefits should be shared equally between them. The suit was for an accounting against the successful bidder after he had declined to pay his confederate the latter's alleged share of the profits. After a full analysis of the facts and authorities bearing on the subject, this Court, held that the cause of action, arising as it did out of a contract in restraint of trade, could not give rise to any enforceable rights in favor of the plaintiff.

It should be noted that a defense of violation of the anti-trust laws is not available in an action for infringement of a copyright. This is vastly different from the assertion, as a result of such a holding, that the activity of the one holding the copyright is not in violation of the anti-trust laws. Indeed, even though the complainant in a suit to enjoin infringement is admittedly violating the Sherman Act, that defense is not available.

*Vitagraph, Inc., et al v. Grobaski*, 46 F. (2d) 813, 814;

*Witmark & Sons v. Past Time Amusement Co.*, 298 F. 470, 480;

*Harms et al v. Cohen*, 279 F. 276, 280.

Therefore, the application of the "clean hands" maxim to plaintiffs thus mis-using their copyrights should appeal with great force to the equitable discretion of the Court.

### III. ALL PORTIONS OF THE STATUTE PERTINENT TO THIS CASE ARE CONSTITUTIONAL. (Assignment of Error 10).

#### Foreword

Before proceeding with the consideration of this question it is necessary to point out that the statute, while enacted as a single piece of legislation, in reality covers one main subject and several others which are quite disconnected with the main subject. The main subject dealt with is the prevention of unlawful monopolies and restraints of trade in the public performance for profit of copyrighted music in the State of Florida.

This main purpose is clearly declared in section 1, and by reference to that section, forms also the subject of sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8, 9.

As will be shown in a detailed analysis which follows, Sections 2-A, 2-B, 2-C and 6 belong in a special category because they deal with subjects unrelated to the main purpose of the Act. As there shown, the state enforcement officers, defendants in the court below, have no duties to perform with reference to these sections, and the same thing is true of sections 10-A and 10-B, which deal only with the rights of private parties to maintain actions under the statute.

Sections 7-A, 11-A and 11-B deal solely with procedural details, the consideration of which appellees' bill of complaint has attempted prematurely to invoke.

Section 12 is merely the usual "saving clause" declaring that the invalidity of any portion of the Act shall not affect the validity of the remainder.

Section 13 is likewise a general clause declaring the rights and remedies therein provided to be cumulative to those already existing.

The attacks made by the bill upon the constitutionality of the statute are confusingly worded, for the most part without sufficient identification of the sections to which they relate, and are endlessly repetitive. Hence, it will be more convenient to answer them in dealing with specific sections of the statute below.

**A. The validity of Sections 2-A, 2-B, 2-C, 6, 10-A and 10-B of the statute cannot be considered in this proceeding, because the defendant state enforcement officers have no duties to perform with reference to those sections.**

The importance of this point it would be difficult to overestimate, for, upon a careful reading of the bill, it is seen that the larger portion of plaintiffs' complaint against the statute is founded upon sections 2-A, 2-B, and 6. See notably the following paragraphs of the bill: par. 7 (R. 5); par. 25 (R. 23); par. 28 (R. 26); par. 29 (R. 27); par. 31 (R. 28).

This point was urged upon the District Court, but the court failed in its "Findings of Fact and Conclusions of

Law" to make this all important differentiation between the sections of statute involving duties of the defendants and those not involving such duties (R. 276-284). This fallacious conception of the scope of the act is strikingly illustrated in Findings 5 and 6, which are based solely on the operation of Sec. 2-A and 2-B of the Act.

If, as appellants contend, these sections of the statute require no duties of them, and present merely questions for determination in civil suits between the owners of public performance rights in copyrighted music and those who are claimed to be infringing upon such rights, then this case will be indeed vastly simplified.

Section 2-A (see Appendix 1) in substance provides that all authors, composers and publishers selling any musical composition in Florida in whatever form published, printed, manufactured or prepared for use must cause to be specified thereon its selling price; that when a purchaser acquires the composition and pays the specified selling price, the purchaser may render or permit to be used or rendered such composition by players, orchestras, bands, radio apparatus, electrical transcriptions, music records or otherwise, either privately or publicly without further license fees or exactions, the initial selling price being deemed to be full compensation for all such renditions.

Section 2-B provides that if any author, composer or publisher fails to affix the selling price on a musical composition and collect the same in the time and in the manner provided in Section 2-A, then any person in Florida who has purchased such composition may use it for private or public performance for profit without further license fee and shall be free from lia-

bility in any infringement or injunction suit or suits instituted by the copyright proprietor.

Section 2-C declares that it is not the purpose of the statute to give any purchaser of copyrighted musical compositions the right to resell, copy, publish or vend; nor to prevent authors and publishers from determining the price to be charged for the use or rendition of their copyrighted musical compositions, if they act independently of such a combination as described in Section 1 of the statute, a section which will be later discussed in this brief.

Section 6 deals with radio stations, theaters, moving picture houses and similar places of entertainment in Florida which are affiliated with concerns outside of the State originating the performance of copyrighted music, whether the original rendition of such music is by radio sound production instrumentalities or by furnishing persons to sing or play such music in the state. With respect to such concerns it places the entire responsibility and liability for the use of copyrighted music upon the affiliate outside the state who originates the broadcast or other performance. It forbids the owner from suing for copyright infringement, loss or damage within this state because of the Florida performance, remitting him to make his collection from the outside affiliate.

None of these four sections of the statute lays any duty whatever upon the Attorney General of Florida or his co-defendants, the State's Attorneys. Instead, each of them merely attempts to define the consequences of certain conduct of omission or commission on the part of the copyright owner as releasing a Florida performer of the musical composition from liability to such owner.



In the case of sections 2-A and 2-B, the omission to affix the price upon the musical compositions sold in Florida is declared to bring about the release of liability on the part of the Florida performer. Section 2-C is legislation in favor of the copyright owner, for it forbids the Florida performer from reselling, publishing or vending the composition.

Section 6 places upon the copyright owner the responsibility of so selecting the radio broadcasting chain and the theatrical and musical performance syndicates with whom he does business that he will be enabled to collect from them if such performances are rebroadcasted or otherwise reproduced in Florida.

Let us now see whether elsewhere in the Act any duties are cast upon these appellants with respect to these sections of the statute, bearing in mind always, that the object of the suit is to enjoin persons occupying state offices from performing duties cast upon them by a law claimed to offend against constitutional guaranties.

The key to the duties of the appellants is found in section 9, which reads as follows:

"Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, *it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combina-*

*tion as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable."*

By the language emphasized above it plainly appears that the duty of the Attorney General and State's Attorneys is to proceed only against combinations declared unlawful in Section 1 of the statute and the members, agents, or representatives of such unlawful combinations. By no stretch of the imagination can it be said that those who fail to put prices on their musical compositions sold in Florida (Sections 2-A and 2-B), or those who try to collect license fees from Florida broadcasters reproducing music rendered outside the state by a national hookup, are declared to be an unlawful combination as defined in Section 1. Any attempt by state prosecuting officers to visit civil or criminal proceedings upon copyright owners under the terms of Sections 2-A and 2-B or 6 would be so palpably without color of law as to afford the defendants ample remedy by habeas corpus or other summary procedure.

By order of this Court the present incumbent in the office of Attorney General of Florida has been made a party to this suit. It will be borne in mind that section 9 of the statute places him in supreme charge of all criminal and civil enforcement procedure. By this brief he evidences his construction of the law to be that there is no occasion for the activities of the Attorney General or the State's Attorneys with reference to these sections of the statute. With this construction placed upon the law by the chief law officer of the state, how can it be said that the plaintiffs stand in danger of losing the rights granted them by the copyright act because of any action of the appellants under sections 2-A, 2-B or 6? Surely, as to these sections there is no need for an injunction.

Conversely, the correct procedure for testing the rights of the copyright owners or those holding public performance rights under them is apparent upon a mere perusal of these sections of the statute. If a copyright owner fails to affix a price upon his composition sold in Florida and it is thereafter publicly performed for profit by the purchaser, the owner has only to bring the usual infringement suit. If the defendant in the infringement suit pleads the Florida statute, an issue is at once made in the federal court concerning the constitutionality of that provision, and it will be assumed that the federal court will fully protect all rights granted the owner by the copyright act, notwithstanding any state enactments to the contrary.

In any such case the constitutionality of the section of the state statute would be appropriately tested in a federal court, in a civil action. In no such case does

the Florida statute lay upon these appellants the duty to enforce any criminal or civil penalties upon the copy-right owner in respect of such a proceeding.

The barest inspection of Sections 10-A and 10-B shows them to be likewise entirely foreign to any duties of the state enforcement officers. Section 10-A gives the right to any person in the State of Florida aggrieved by reason of anything forbidden in the Act to recover damages, including attorney's fees. Section 10-B provides that in the event of the failure of the state prosecuting officers to bring proceedings as directed by the Act, then such proceedings may be brought by any aggrieved party proceeding in his own behalf and that of other parties similarly situated.

So far as we are advised, appellees do not contend that these sections are involved in the present proceeding, and they are mentioned here solely to complete our analysis of the statute.

**B. The Consideration of the Constitutionality of Sections 7-A, 11-A and 11-B is prematurely invoked in the Present Proceeding.**

SECTION 7-A. This section provides that any person, firm or corporation within this state who acts as representative for an unlawful combination as defined in section 1 is declared an agent for the service of process against the combination.

Obviously, this section deals purely with a question of procedure, and it is prematurely raised in the instant suit when no action, civil or criminal, is pending against

anyone (Aff. Landis, R. 211). When and if a suit is brought and an attempt is made to serve someone as the Florida representative of such combination, it will be presumed that the Florida court will give due consideration to any proper attack made against the validity of the service. Even if it failed to do so, surely this court cannot be asked now to assume that the Florida Supreme Court would improperly affirm the lower court; and further to assume that if the Florida Courts did adjudicate the question erroneously, this Court, in the exercise of its appellate jurisdiction regarding federal questions, would indulge in the error committed by the Supreme Court of Florida.

In *Cavanaugh v. Looney*, 248 U. S. 453, this Court was asked to consider the constitutionality of a statute of the State of Texas empowering the regents of the state university to condemn lands for university purposes. In affirming the decree of the District Court refusing to enjoin the operation of the statute, this Court said (pp. 456, 457):

"Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a Federal right, the appropriate and adequate remedy by review here is obvious."

No comment could be more appropriate to the present situation.

SECTIONS 11-A AND 11-B. These are the sections requiring defendants in actions brought under the statute



to produce documentary evidence. These sections are subject to the same comment as made above with respect to Section 7-A and, for the reasons there stated, consideration of their validity is premature at the present time.

In addition, it must be noted that the defendant is not bound to produce anything until the court has made an order requiring it. Surely it cannot be presumed that the court to whom application is made will exercise its authority arbitrarily or unreasonably or in defiance of constitutional provisions protecting against self-incrimination and unreasonable searches and seizures! Should the court fail in the first instance to afford defendant this protection, there is no clause in the act prohibiting the defendant from filing his motion to suppress the evidence, and thus due process would be afforded. A well known illustration of this corrective power of a court is found in the case of *Gouled v. United States*, 255 U. S. 298, where this Court held that at the trial of one charged with crime the court should have considered defendant's objection that certain of the government's documentary evidence was obtained in violation of the Fourth and Fifth Amendments to the Federal constitution; even though an earlier motion for the return of the papers to the defendant had been denied.

The penalty provided for failure to comply with the court's order is \$100 per day for each day of default, a figure which does not appear drastic or unreasonable as applied to an organization transacting the vast business portrayed by the plaintiffs in their bill. The procedure in the Florida courts with respect to proceedings for contempts not committed in the presence of the court

is by rule requiring the respondent to show cause why he should not be committed. *Palmer v. Palmer*, 28 Fla. 295, 9 So. 657. Answer being made to the rule, respondent is then given ample opportunity to defend himself against the charge; and here again, it should not be assumed that the court would impose a penalty for failure to obey an order made in disregard of respondent's constitutional rights.

**C. Section 1 of the statute and its Dependent Sections 3, 4-A, 4-B, 5-A, 5-B, 7-B, 8 and 9, represent a valid exercise of the police power of the State of Florida in the Prevention of Monopoly and Unreasonable Restraints of Trade.**

The perusal of these sections of the statute shows clearly the dependence of Sections 3, 4-A, 4-B, 5-A, 5-B, 7, 8 and 9 on Section 1, for the provisions of each of these sections are by express language conditioned upon Section 1.

If Section 1 falls, all must fall. If Section 1 is good, as appellants now expect to demonstrate, the affiliated sections will likewise be good as against the main attack, leaving to be dealt with only such special challenges as have been asserted against those particular sections.

**SECTION 1.** This section strikes the keynote of the whole statute. It declares unlawful any combinations of authors, composers, publishers, or owners of copyrighted music, constituting a substantial number of persons owning such copyrighted compositions in the United States—if the object of such combination is to declare or fix license fees or other compensation for the use or rendi-

tion of copyrighted music for private or public performances for profit.

It forbids the collection of license fees so fixed by such combination from any person, firm or corporation within the State of Florida, including radio broadcasting stations, theatres, moving picture houses, hotels, restaurants, clubs, dance halls, et cetera; forbids the collection of such collection fees in any Court within the State; makes any such collection of attempted collection a separate offense; denounces such price fixing as in restraint of trade, and declares the collection or attempted collection to be an intra-state transaction.

**SECTION 4-A.** Relieves all radio broadcasting stations in Florida from payment of any license fee for the use of copyrighted music owned or controlled by an unlawful combination as defined in Section 1.

**SECTION 4-B.** Provides that if a broadcasting station in Florida is affiliated with a station outside Florida, which broadcasts musical compositions to be rebroadcast within the State under the affiliation agreement, then the outside broadcaster is forbidden to collect from the Florida broadcaster any license fee for the purpose of paying it to an unlawful combination as defined in Section 1.

**SECTIONS 5-A AND 5-B.** Are the exact counterparts of Sections 4-A and 4-B, respectively, except that they deal with theatres, moving picture houses, and similar places of entertainment and amusement instead of radio broadcasting stations.

**SECTION 7-B.** Makes any person negotiating or attempting to collect license fees for an unlawful combina-

tion, as defined in Section 1, a part of the combination and subject to the penalties of the Act.

SECTION 8. Provides penalties for any unlawful combination or other person attempting to act within this state in violation of the terms of the Act and for any agent of a person who aids or attempts to aid an unlawful combination.

SECTION 9. Grants jurisdiction to the Circuit Courts of Florida to prevent and restrain violations. It requires the State's Attorneys *under direction of the Attorney General* to institute proceedings, civil, criminal, or both, against any unlawful combination as defined in Section 1, its members, agents, or representatives. Civil actions are to be instituted by petition, and the Court is given power to issue temporary restraining orders as deemed equitable.

The attack levied against Section 1 (bill, pars. 7, 26, 30, 32, 35; R. 5, 24, 28, 29, 30), so far as it may be determined from the extremely general language in which the bill is couched may be simplified into the following\*:

- (1) That the section constitutes an unlawful interference with the Federal Copyright Act;
- (2) That it is an unreasonable and arbitrary exercise of the police power;

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\*The "Findings of Fact and Conclusions of Law" entered by the 3-judge court *long after the granting of the order for injunction* (R. 276-284) follows substantially the same line of attack. [The "Memorandum Opinion" filed with the order for injunction (R. 269) stated only that "there is grave doubt of the constitutionality of the Act", without specifying any reasons].

(3) That it denies to plaintiffs the right of access to the federal courts;

(4) That it operates extra-territorially;

(5) That it violates the "equal protection of the laws" clause by discriminating against holders of musical copyrights, leaving others kinds of copyrighted property unaffected.

(6) That it is too indefinite to support the penal provisions.

These points will be discussed in the order stated:

(1) (2) *Section 1 does not constitute an unlawful interference with the federal Copyright Act, but is a lawful exercise of the State's police power.*

These two points we discuss together, for the one is the corollary of the other.

In defining what is an unlawful invasion by a State of the province of Congress, it is well settled that where Congress has exercised a constitutional power by legislating on a subject in such manner as to show an intention to cover that subject completely, then the State is blocked from entering that field. Conversely, when Congress has the power but has seen fit not to exercise it then the State is free to act.

*Carey v. South Dakota*, 250 U. S. 118, 122;

*Savage v. Jones*, 225 U. S. 501, 533;

*M. K. & T. Ry. Co., v. Haber*, 169 U. S. 613, 623.

Now so far as concerns physical articles which are the subjects of inter-state commerce, Congress has legislated against restraints of trade by the Sherman Anti-



trust Act and other legislation; and with reference to such articles, the monopoly granted to the copyright or patent owner by federal statute may not be used as a tool to assist him in accomplishing an unreasonable restraint upon interstate commerce.

*Straus v. American Pub. Ass'n*, 231 U. S. 222.

*Standard Sanitary Mfg. Co., v. United States*,  
226 U. S. 20.

It cannot be doubted that Congress, if it saw fit to do so, could make similar regulations forbidding the use of intangible copyright rights so that they might not be used as weapons in aid of monopoly. Should it do so, the field would be pre-empted, and no State might act. But Congress has not seen fit to do this; hence the field is open to the State so long as it does not trespass upon the rights which Congress has definitely conferred upon the owner.

In the instant case the regulation made by the State statute does not interfere with any right granted him as an individual by the copyright act. Notwithstanding the passage of this Act, the owner may continue freely to deal with it as an individual and may license it to whomsoever he pleases, either in whole or in part, and may exact therefor whatever consideration may be agreed upon. It is only where a large number of copyright owners band together to fix prices and, in effect, to deprive Florida users of their freedom to trade that the Florida statute interferes.

The copyright clause of the Federal Constitution (Art. I, sec. 8 (8) ) gives Congress the power to secure to authors the right to "their respective writings". Can

it be doubted that the word "their" as thus used is to be taken in a distributive sense? If so, what is promised to each author, is that he shall have the benefit of *his own writing*—not of someone else's writing.

But, to determine this problem we are not remitted to these general considerations, for this Court has repeatedly committed itself to the doctrine that the state, in the exercise of its police power, may enact reasonable regulations affecting commercial dealings in patents and copyrights within its borders:

*Allen v. Riley*, 203 U. S. 347;

*Patterson v. Kentucky*, 97 U. S. 501;

*John Woods & Sons v. Carl*, 203 U. S. 358;

*Ozan Lumber Co., v. Union County National Bank*, 207 U. S. 251;

*Carbice Corp., v. American Patents Corp.*, 283 U. S. 27, 33, foot-note;

*Fox Film Corp., v. Doyal*, 286 U. S. 123.

In *Allen v. Riley*, *supra*, 203 U. S. 347, it was held that while a state may not pass any law prohibiting the sale of patents for inventions or nullifying the laws of Congress regulating their transfer, a state has the power, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens against fraud; and a requirement of the statute of Kansas that before the sale or barter of patent rights, an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the clerk of the county within which the rights are intended to be sold, is not an unreasonable regulation by the state.

This Court said (203 U. S. 352):

"It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provision quoted above, and that any regulations whatever, by any state authority in regard to such assignment or sale, and making provision in respect to them, are illegal."

That is precisely the contention here: that because the Society enjoys the rights of public performance under these copyrights any regulation as to how they may be used in Florida is illegal.

The Court further said (pp. 355, 356, 357):

"We think the State has the power (certainly until Congress legislates upon the subject) with regard to the provisions which shall accompany the sale or assignment of rights arising under a patent *to make reasonable regulations* concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act, referred to.

"... Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so. *It has simply provided that every patent or, interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safe-guarding of the interests of those dealing with the assumed owner of a patent, or his assignee.* To deal with

that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute . . . The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the States to legislate on the subject themselves in a manner neither inconsistent with nor opposed to the Federal statute."

Is there any difference in substance between a regulation which covers *frauds as to the ownership* of a patent, and one which covers, as this one does, the use of public performance rights to enforce an unreasonable restraint on trade, a monopoly?

In the lower court appellees filed a brief in which they quoted with approval the following excerpt from the opinion in the Allen case (p. 356):

*"The act must be a reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various States the power to provide for the safe-guarding of the interests of those dealing with the assumed own-*

er of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute. *The expense of filing copies of the patent and the making of affidavits in the various counties of the State in which the owner of the rights desired to deal with them is not so great in our judgment as to be regarded as oppressive or unreasonable, and we fail to find any other part of the act which may be so regarded.* Some fair latitude must be allowed the States in the exercise of their powers on this subject. It will not do to tie them up so carefully that they cannot move, unless the idea is that the States have positively no power whatever on the subject."

Appellants welcome a joinder of issue on this excerpt.

Is this Florida statute a "reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil"? Let it be left to plaintiffs' bill to answer that question. Here are 123 music publishers (R. 16) and 1000 American authors and composers, who pool their public performance rights in all copyrighted music owned by them, armed with the American rights of 44,000 foreign authors and composers, for the purpose of fixing prices of public performance rights in Florida and elsewhere. To be admitted to their association is an act of grace (R. 51, 52); and the affairs of the association are administered by a self-perpetuated Board, which fixes license fees based on the right to use not less than the entire portfolio of music, (R. 52, 20)



and distributes the net profits among each class of its membership as it sees fit (R. 58). When to this are added the additional facts that the association controls performance rights on approximately 60% of the published copyrights in the United States (aff. W. Walter Tison, R. 215), and that the license fees are fixed according to the arbitrary discretion of the Board, *bearing most oppressively on radio stations not 51% owned by a newspaper* (R. 243)—then it is small wonder the Legislature of Florida decided it was time to act!

In *John Woods & Sons v. Carl*, 203 U. S., 358 the Supreme Court, following the Allen case, *supra*, held that a state statute was valid which rendered void any promissory note, if given for a patent right, if the note does not show on its face for what it was given.

In *Ozan Lumber Co., v. Union County National Bank*, 207 U. S. 251, the court followed the two previous cases, and again held the Arkansas statute valid as against the claim that it was unconstitutional because it excepted from its provisions "merchants and dealers who sell patented things in the usual course of business."

In *Patterson v. Kentucky*, 97 U. S. 501, a leading case on the right of the State to regulate the use of patent rights, the court held that the state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States. This Court said (pp. 503, 505, 506):

"It is true that letters-patent, pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others, his invention or discovery, throughout the United

States and the Territories thereof. *But obviously this right is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police. 'In the American Constitution system', says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government.'* Cooley, Const. Lim. 574. . . .

" . . . . We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a state of tangible personal property which that state declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits.

. . . . .

"These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that *the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the com-*

*plete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."*

In *Carbice Corp., v. American Patents Corp.*, 283 U. S. 27, 33, footnote, Mr. Justice Brandeis, speaking for the court, said:

"Nor does the grant of a United States patent exempt the patented product from limitations imposed by state police statutes. *Patterson v. Kentucky*, 97 U. S. 501; *Allen v. Riley*, 203 U. S. 347; *John Woods & Sons v. Carl*, 203 U. S. 358; *Ozan Lumber Co., v. Union County National Bank*, 207 U. S. 251."

In *Fox Film Corp., v. Doyak*, 286 U. S. 123, the court held that copyrights are not federal instrumentalities; that they are like patents; that a copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit, and forms the basis of extensive and profitable enterprise; that in creating the right Congress did not reserve to the United States any interest in the production itself or in the copyright, or in the profits therefrom; that the mere fact that a property right is created by a federal statute to fulfill a governmental purpose does not make it non-taxable by a state when it is held in private ownership and exercised for private advantage, and that *therefore a statute of Georgia imposing a license tax, measured by gross receipts of royalties within the state, on the "business of licensing copyrighted motion pictures"* engaged in by a New York corporation *was a valid state statute.*

Measured by these decisions, the State of Florida was well within its rights when it enacted this statute forbidding the sale in Florida of public performance rights of copyrighted music placed in a combination for price fixing purposes.

As a part of plaintiffs' attack on the statute as an abuse of the police power, it is charged in the bill (pars. 26, 29; R. 24, 27) that it will deprive them of the means of detecting infringements, and fixing license fees, because the cost of operating independently of the Society would exceed the amount which each of the plaintiffs would receive from his Florida operations.

The fact that plaintiffs may find the regulation oppressive, that it may increase their labor and decrease the value of their property does not invalidate the regulation. II *Cooley's Const. Lim.* 1228.

But after all, the statute is not factually open to this attack.

There is not a word in it which would interfere with these or similar beneficial activities, if dissociated from the price-fixing monopolistic operations. Apart from such unlawful operations, there would be nothing in section 1 or any other part of the statute to forbid the owners of public performance rights in copyrighted music to use the Society, or any other organization, as a clearing house for information to assist the owners in prescribing reasonable license fees, as licensing agent to execute contracts with Florida users of the music for profit, as collecting agent to collect fees, or as investigating agent to detect infringements and to assist in prosecuting them.

With the vast fund of information and experience at its command, there can be no doubt that the Society could perform lawfully a useful and beneficial function alike to the owners of the performance rights, to the Florida entertainment and amusement industries and to the public which they serve, with proper apportionment of the costs among foreign and American owners.

We submit that the lengthy and dismal prophecies of disaster to the publisher and composer plaintiffs contained in the bill of complaint and in their highly rhetorical affidavits are without substantial basis of fact so far as concerns those parts of the statute with which this Court is now concerned.

**(1) Section 1 and its dependent sections do not attempt to deprive the Federal Courts of Jurisdiction.**

The language of the statute claimed to give rise to this implication is found in sections 1 and 3: in section 1:

“ \* \* \* and such license fees or other exactions by such combination or its agents, member, or interested parties shall not be collected in any Court within the boundaries of this State \* \* \* ”

In section 3:

“All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, \* \* \* ”



Plaintiffs completely disregard the well-defined rule of statutory construction that, where broad terms are used in a statute, a legislature is presumed to be legislating only with respect to those things which are within its legislative jurisdiction. Frequently the term "any Court" has been used, both in state and federal legislation, yet the statutes have been upheld as constitutional.

In the early case of *Wells v. Central Vermont R. R. Co.*, 29 Fed. Cas. 643, 644, Sec. 3224 U. S. Rev. Stat. was involved. This section provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The court stated that, taken literally, these words would prohibit such a proceeding in state courts as well as in federal courts, then said:

"But Congress has no control over state courts in respect to taxes, and it is *not to be presumed that it intended to reach beyond where its power extended*, but to the contrary; and, therefore, that broad construction cannot prevail."

In *Colby v. Cleaver*, 169 F. 206, 208-209, an Idaho statute required foreign corporations to comply with certain conditions before doing business within the state, and declared that no contract made in the name or for the use or benefit of a non-complying foreign corporation, could be sued on or enforced in "*any court of this state*". It was held that this limitation should be construed as applicable only to courts under the jurisdiction of the legislature, and that it was not intended to preclude the corporation from resorting to the Federal courts in Idaho to enforce a mortgage on land in that state.

In *Shaw v. Meyer-Kiser Bank* (1927), 199 Ind., 687 it was held that the words "*any court . . . . . wherever situated*" as used in an Indiana statute relating to mortgage of real estate by the guardian of a ward, did not empower the court of a sister state to take jurisdiction over real estate titles in Indiana, even though the court of the sister state followed the statutory procedure.

*Reynolds v. Enterprise Transportation & Transit Co.*, 198 Mass., 590, 85 N. E. 110, 112, involved a Massachusetts statute which provided that an attachment of property on mesne process should be dissolved by the appointment of a receiver to take possession of the property by "*any court of competent jurisdiction in this commonwealth*". The statute further provided that, when an attachment had been so dissolved the receiver should not be discharged until all the assets in his hands had been fully distributed, or the claim upon which the attachment was made had been fully paid. It was held, that the words "*any court of competent jurisdiction in this commonwealth*" meant any court subject to the legislation of the commonwealth, and that the statute did not apply to receivers appointed by federal courts. Obviously, there is no difference between the phrase "*any court . . . . . in this commonwealth*" (Massachusetts) and "*any court within the boundaries of this state*" (Florida) or "*any court within this state*" (Florida). Clearly the words "*of competent jurisdiction*" in the Massachusetts statute are of no consequence here, meaning only such courts as have power to appoint receivers.

In the absence of words incapable of any other construction, this Court will not assume that the Florida

Legislature "intended to reach beyond where its power extended" (*Wells v. Central Vermont R. R. Co.*, supra).

**(2) Section 1 and its dependent sections are not void because of the alleged charge of extra-territorial operation.**

The bill alleges (R. 30) that the defendants will enforce said statute against the complainants "when they enter into license agreements without the State of Florida with the residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida". Also (R. 26), "complainants will be able to license users of their music in Florida without doing any act in said State; but unless the injunction prayed for herein is granted complainants will be unable to issue any licenses without the State of Florida without incurring the penalties of said State's statute."

Therefore the question is squarely presented—May the State of Florida by legislative enactment make it a criminal offense for the complainants to execute license contracts outside of Florida, which contracts are to be performed within the State of Florida and penalize the complainants, or their agents, who are guilty of such offense when they are found within the jurisdiction of Florida?

This Court has held the general rule to be that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done and not by the law of the country where the contract for the performance of the act is executed.

Thus, in *American Banana Co., v. United Fruit Co.*, 213 U. S. 347; acts done by the United Fruit Company in Costa Rica (p. 355, 356) were held without the scope of the Sherman Act.

Likewise this Court has held that the State of Michigan may punish a person for acts done in the State of Illinois with the intention to produce, and producing, detrimental effects within the State of Michigan *even though such person had never set foot in Michigan until after the crime was committed.*

*Strassheim v. Daily*, 221 U. S. 280.

It is obvious that if the rule were otherwise a state would be seriously handicapped, if not rendered helpless, in protecting its citizens from, and preventing, acts which the State Legislature has branded as criminal. The case at bar is an excellent example of what the result would be were the rule otherwise than that stated above. In the case at bar the Legislature of the State of Florida has placed its stamp of disapproval upon, and declared criminal, the monopolistic activities such as those engaged in by the Society by declaring its license agreements or license contracts to be unlawful. If the State of Florida is without the power to restrain the Society from performing in Florida its contracts *executed outside* the State, then such practices will continue to flourish in the State of Florida notwithstanding the Legislature's condemnation thereof.

In *Strassheim v. Daily*, *supra*, Daily had been convicted of procuring Armstrong, a public official of Michigan, to pay bills presented to the State which Armstrong knew to be fraudulent. It was objected that dur-

ing the whole period during which the crime was committed Daily was in Chicago, *Illinois*, and could not be punished under an indictment found in *Michigan* for such offenses. The Supreme Court denied this objection and approved the conviction saying (p. 285):

"If a jury is to believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceive the Board of Control, induce by fraud the payment by the State, the usage of the civilized word would warrant Michigan in punishing him, *although he never had set foot in the State until after the fraud was complete*. Acts done outside of jurisdiction but intended to produce and producing detrimental effects within it, justify a State in punishing the *cause* of the harm as if he had been present at the *effect*, if the State should succeed in getting him within its power. *Commonwealth v. Smith*, 11 Allen 243, 256, 259; *Simpson v. State*, 92 Ga., 41; 17 S. E. 984; *American Banana Co., v. United Fruit Co.*, 213 U. S. 347, 356; 53 L. Ed. 826, 832; 29 Sup. Ct. Rep. 511; *Commonwealth v. Macloon*, 101 Mass., 1, 6, 18; 100 Am. Dec. 89. *We may assume, therefore, that Daily is a criminal under the laws of Michigan.*"

In the case of *Ford v. United States*, 273 U. S. 593, this Court held that one may be guilty as a party to a conspiracy to import liquors into the United States in violation of the national prohibition law where there are overt acts committed in the United States pursuant to said conspiracy although the person was at the time of



the conspiracy *outside of the territorial jurisdiction of the United States.*

Affirming the judgment of conviction in the court below, the Court said (p. 619):

"The next objection of the defendants taken from the Quadra is that on all the evidence they were entitled to a directed verdict of not guilty. They argue that they are charged with a conspiracy illegally to import or to attempt to import liquor into the United States *when they were corporeally at all times during the alleged conspiracy out of the jurisdiction of the United States, and so could commit no offense against it* \* \* \* The conspiracy was continuously in operation between the defendants in the United States and those on the high seas adjacent thereto, and of the four overt acts committed in pursuance thereof, three were completed and took effect within the United States and the fourth failed of its effect only by reason of the intervention of the Federal officers \* \* \* In such a case all are guilty of the offense of conspiracy to violate the United States laws *whether they are in or out of the country.*"

In the Ford case the Court also quoted with approval an opinion rendered by John Basset Moore (later Judge of the permanent Court of International Justice), while he was Assistant Secretary of State, which opinion is found in *Moore's International Law Digest*, Vol. 2, p. 244:

"The principle that a man who, outside of a country wilfully puts in motion a force to take

effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application."

In *Latham v. United States*, (CCA 4; 1924), 2 F. (2d) 208, the evidence showed the defendants had been sailing a vessel laden with whiskey about fourteen miles off the coast of the United States with the intention of landing the unlawful cargo, and part of it had been landed, and they were arrested when they inadvertently came within two miles of shore.

The Court said in its opinion upholding the conviction (p. 210):

"It is argued on behalf of the defendants, however, that they should escape because the aiding and abetting in the crime of those who sold in the United States whiskey purchased from the ship was (done) on the high seas *outside* the territorial waters of the United States. The facts do not bring the case within the general rule that the character of the act as lawful or unlawful must be determined solely by the law of the country or place where the act is done. The defense, therefore, *that the defendants sold the whiskey on the high seas where it was lawful to sell it is not available*. The defendants being under arrest in the United States it *makes no difference that they were outside the juris-*

*diction when by aiding and abetting they become principals in crime committed in the United States.* They could not have been extradited as fugitives from justice because they had not fled the United States. By being under arrest in the jurisdiction they could be tried and convicted as participants in the crime."

In *United States v. Bowman*, 260 U. S. 94, the Court held that the defendant was properly convicted under a Federal statute prohibiting a conspiracy to defraud the United States Government by presenting false claims for payment even though the defendant was *without the jurisdiction* of the United States or any state thereof.

The Court distinguished between those types of crimes where the actor must be within the jurisdiction of the government to be punished, and those types of crimes where the actor need not be within the jurisdiction of the government in order to be punished, saying (p. 98):

"Crimes against private individuals of their property, like assault, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds which affect that peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If the punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." \* \* \*

"But the same rule of interpretation should not be applied to criminal statutes which are,

as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud *wherever perpetrated*, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute, and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."

Under the decisions discussed above, the Florida statute is not subject to attack in this suit on the ground that it aims to punish parties, if they be found in the jurisdiction of the State, for acts done without the jurisdiction of the State of Florida with the intent to produce and producing results in the State of Florida which the Legislature has declared to be unlawful.

*A fortiori* section 8 of this statute which punishes only the *acts done in Florida* in pursuance of contracts made elsewhere, is valid.

(3) Section 1 and its dependent sections do not deny to the owners of copyrighted music the equal protection of the laws by subjecting them to regulations not imposed upon the owners of other copyrights or the owners of uncopyrighted literary property.

Plaintiffs' attach upon the statute in the court below rested upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, which held invalid the Illinois Anti-trust Act of 1893 because it specifically exempted from the entire operation of the statute all agricultural products and live stock while in the hands of the producer or raiser.

Appellants have no fear of the Connolly case if the Florida statute be judged by the *reasoning* of that case rather than merely by the *results* reached. For after saying (p. 558) that, "no rule can be formulated which will cover every case", the court pointed out specifically the defect in the Illinois statute, (p. 564):

"Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statutes, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their good or merchandise; but their neighbors, who happen to be agriculturalists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own



benefit; for it cannot be disputed that agricultural products and live-stock in Illinois constitute a very large part of the wealth and property of that state."

If, therefore, there is a reasonable basis for the classification of holders of performance rights in copyrighted music which does not exist as to performance rights in other copyrighted material, or in uncopyrighted literary property, the Connolly case does not apply. The reason for the classification made in the Florida statute is plain.

Before drawing the comparison let it be borne in mind that this discussion excludes entirely the requirements of secs. 2-A, 2-B and 6 of the statute, shown above to have no relevance to the instant case.

First, as to owners of other copyrights: What likelihood is there that the owners of copyrights of a substantial portion of all of the books and plays in existence would or could combine to fix prices on public performance rights for their works? Has anyone ever heard of such a combination? What books or plays are broadcasted by radio to such extent as to make a matter of public concern the charges that are or might be required for such broadcasting? In this case plaintiffs allege (bill, par. 28, R. 27) that there are daily broadcasted in Florida "in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies."

The quoted excerpt from the decision in the Connolly case shows that the exemption of agricultural products in Illinois was not "of slight consequence" because agricultural products and live stock comprise a large part

of the wealth of that state. Public performance rights in copyrighted works other than music would be "of slight consequence."

And now, turning to owners of uncopyrighted literary property: How could the owners of such property even discover one another so as to form such a combination? And of what value or consequence would performance rights in such uncopyrighted properties be, if combined?

In fact, to say that copyrighted music is on a parity with these other two classes as to performance rights is to ignore completely facts of which everyone is aware. It would be as logical to say that a law requiring banks to incorporate denied equal protection in not extending the regulation to everyone who might casually act as custodian of his friend's money, or make a personal loan to a friend.

In *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, the Insurance Company sued to enjoin the Auditor of Iowa from enforcing a statute of that state which forbade fire insurance companies or their agents to combine for the purpose of fixing rates. Upholding the statute against the attack that the equal protection of the laws was denied, this Court said (p. 410):

"It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. With regard to this it should be observed, as is noticed by the appellees, that a general statute of Iowa prohibits all contracts or combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of the same pro-

duced or sold in the State, Code of 1897, § 5060, and that this section covers fire insurance. *Beechley v. Mulville*, 102 Iowa 602. Therefore the act in question does little if anything more than apply and work out the policy of the general law in a particular case."

Similarly, in Florida there is a general statutory prohibition against trusts involving price-fixing activities (Laws of Florida 1915, Vol. I, p. 281 amended by Laws of Florida 1925, Vol. I, p. 517), which completes the analogy between the Carroll case and the case at bar.

In the Carroll case, the Court further said (p. 411):

"If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mutual Life Insurance Co., v. Mettler*, 185 U. S. 308. See also *Missouri Pacific Ry. Co., v. Mackey*, 127 U. S. 205; *Orient Insurance Co., v. Daggs*, 172 U. S. 557; *Otis v. Parker*, 187 U. S. 606; *Home Life Insurance Co., v. Fisher*, 188 U. S. 726, 727."

The Carroll case has been cited and its reasoning applied in numerous later decisions of this Court.

In *International Harvester Co., v. Missouri*, 234 U. S. 199, the Missouri Anti-Trust Acts were upheld against

the contention that they denied equal protection in not extending the prohibitions of the statute to buyers as well as sellers. After analyzing and approving the Carroll decision, *supra*, the Court reviewed a number of its own decisions upholding state statutes which were charged with improper classification (pp. 211-214 incl.), among them the following:

*Ozan Lumber Co., v. Union County Bank*, *supra*—an Arkansas statute requiring notes given in consideration of patented articles to be on a printed form so stating, the statute *exempting* from its operation *merchants and dealers who sell patented things in the usual course of business*.

*German Alliance Ins. Co., v. Kansas*, 233 U. S. 389, 418—a statute which exempted *farmers mutual insurance companies* from certain regulations imposed upon *other fire insurance companies*.

*Provident Savings Institution v. Malone*, 221 U. S. 660—a Massachusetts statute providing for the taking into custody by state officers of *savings bank* deposits unclaimed for thirty years, not applying to *commercial bank deposits*.

See also *Radice v. New York*, 264 U. S. 292, in which a statute limiting hours of employment for women employees was held good despite the fact that it applied only to employees in cities of the first and second class, and exempted certain classes of restaurant employees even in the cities where it did apply. At pages 296 and 297 the Court cites a number of its other decisions in which similar differentiations in state statutes were held valid, saying (p. 296):

"The inequality produced, in order to encounter the challenge of the Constitution, must be '*actually and palpably unreasonable and arbitrary*'. *Arkansas Natural Gas Co., v. Railroad Commission*, 261 U. S. 379, 384, 67 L. Ed. 705, 710, 43 Sup. Ct. Rep. 387, and cases cited."

In the case at bar, it cannot be said that the inequality as between the owners of public performance rights in copyrighted music and owners of other copyright property or unpublished writings is "actually and palpably unreasonable and arbitrary", for the power of the two classes last mentioned to combine adversely to the public interest is at most a remote and speculative possibility.

In the light of these authorities it is readily seen that the Florida statute is not to be measured by the decision in *Connolly v. Union Sewer Pipe Co.*, supra, where the *exempted* classes (farmers and stock raisers) had the power and opportunity, by combining to fix prices, to affect the public interest no less injuriously than the classes *included* in the statute.

**(4) The term "unlawful combination" as used in section 1 is sufficiently defined.**

The bill (par. 7, R. 5) attacks section 1 as denying due process of law and violating the State Constitution, because it fails to inform the defendant of the nature of the accusation against him. The particular respect in which it so offends, they charged in their brief below, is the phrase making the combination unlawful "when the members therein constitute a substantial number of the firms, persons, or corporations within the United



States who own or control copyrighted \* \* \* musical compositions". The statute, they say, gives no clue to what is meant by "a substantial number".

The barest examination of the remaining clauses in section 1 demonstrates this attack to be wholly unfounded. The clause next immediately following in section 1 shows that the *combination* does not become unlawful unless "one of its objects is the determination and fixation of license fees or other exactions." Later clauses declare "*any such combination*" to be an unlawful *monopoly*, and the fixing of prices to be illegal and "*in restraint of trade*."

When these clauses are considered as forming integral parts of one picture, viz, the type of combination declared unlawful, it is seen that the statute measures fully up to the standard of definiteness met by the Sherman Anti-trust Act (U. S. C., Tit. 15, Sec. 1). Section 1 of the Sherman Act denounces as illegal,

"Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade* or commerce among the several States, or with foreign nations \* \* \*";

While section 2 declares guilty of misdemeanor,

"*Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations \* \* \**"

This Court has refused to declare the Sherman Act invalid as an unconstitutional delegation of power, to the Court because of the generality of the first two sections.

*Standard Oil Co., v. U. S.*, 221 U. S. 1.

In *Sugar Institute v. United States*, 297 U. S. 553, 600, the Court said:

"We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions."

The Florida monopoly statute, *supra*, in defining the word "trusts" and "combinations" uses language that is certainly no less "indefinite" than the statute here assailed.

And indeed it must be so. Can it be doubted that, with the power and wealth of the combinations of capital which have grown up in this country in the last 50 years, they would be able to employ legal and business talent sufficiently capable to circumvent any *exact* definition of these terms Congress or the state legislature might use?

The cases cited in support of this point in plaintiffs' brief below dealt with problems such as rates of wages (*Connolly v. General Const. Co.*, 269 U. S. 385) and prices of necessities (*U. S. v. Cohen Grocery Co.*, 255 U. S. 81). The difference between such situations and that dealt with in this Florida statute is obvious. How was a grocer to know whether he was charging a just or an unreasonable price when he sold his customer a pound of sugar or flour? He might violate the law without the slightest intention of doing so. However, under the Florida statute now before the Court, no one could become a member of a combination declared unlawful in section 1 without knowing that it was directly intended

as a means of price fixing and that it was sufficiently powerful to enforce at least partially its strangle hold on the entertainment industries.

**D. Section 3, in declaring void all existing contracts for public performance in Florida made with an unlawful combination as defined in section 1, does not offend against constitutional guaranties.**

The attack of the bill of complaint against this section (pars. 7 and 36; R. 6 and 33) is that it impairs the obligations of contracts heretofore made by the plaintiffs, and that it is an *ex post facto* law.

In considering this section it should be borne in mind that there is a difference between interference by legislative enactment with a contract whose subject matter was *per se* harmless and in accordance with the public policy of the State, and interference with one which inherently belongs in the field of police power.

In *Worthen v. Kavanaugh*, 295 U. S. 56, this Court said:

“ ‘It is settled that neither the contract clause nor the due process clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.’ Atlantic

Coast Line R. Co., v. Goldsboro, 232 U. S. 548 \* \* \*

To like effect see:

*Manigault v. Springs*, 199 U. S. 473;

*New Orleans Gas Co., v. Louisiana etc., Co.*,  
115 U. S. 650;

*New Orleans Water Works Co., v. Rivers*, 115  
U. S. 674;

*Union Dry Goods Co., v. Georgia Public Ser-  
vice Corp.*, 248 U. S. 372;

*Stephenson v. Binford*, 287 U. S. 251, 276.

In *Home Building & Loan Association v. Blaisdell*,  
290 U. S. 398, 434-5, the Court said:

"\* \* \* the state also continues to possess au-  
thority to safeguard the vital interests of its  
people. It does not matter that legislation ap-  
propriate to that end 'has the result of modify-  
ing' or abrogating contracts already in effect'.  
*Stephenson v. Binford*, 287 U. S. 251, 276."

And so it is in the field of monopoly, which has always  
been regarded as inimical to the public welfare and  
against public policy. *Standard Oil Co., v. United States*,  
221 U. S. 1.

Section 3 does not attempt to invalidate any existing  
contracts or licenses except those made with an unlaw-  
ful combination as defined in the act; nor does it in any  
wise interfere with the full enjoyment of all rights of  
the copyright owner, including the right of collection of  
license fees, unless he has subjected himself to the State's  
police power by affiliating with the unlawful combination.

Appellees' contention that the statute in this regard is an *ex post facto* law is not maintainable, for this Court has repeatedly decided that the term "*ex post facto*" as used in the Federal Constitution relates to criminal laws only.

*Carpenter v. Pennsylvania*, 17 How. 456,  
citing;

*Colder v. Bull*, 3 Dall. 386;

*Fletcher v. Peck*, 6 Cranch 87.

There can be no question of the creation of a retrospective crime here. *It is not the past act of making the contract that becomes an offense under section 3, but the future act of attempting to enforce such a contract.*

And finally, even if section 3 were held to impair the obligation of contracts within the meaning of the Constitution, the section is clearly severable from the remainder of the act, for it cannot be said, particularly in the face of section 12, that the Legislature would not have adopted the statute minus section 3. Clearly the major purposes of the statute could be accomplished without section 3.)

The situation is entirely different from the Illinois Anti-trust Act held void in *Connolly v. Union Sewer Pipe Co.*, supra. There the offending section created an excepted class who, though performing the actions denounced by the statute, yet by express language fell without its penalties. Consequently the court was obliged to hold that the Legislature would not have enacted the statute had it realized that farmers creating monopolies must be punished as well as merchants.



**E. The Penalties Imposed by Section 8 for Violations of the Statute are not so Severe as to Prevent Plaintiffs from Testing its Validity Aliunde a Court of Equity.**

In paragraph 35 of the bill (R. 30) it is charged that the penalties attached to the violation of the statute are so great that

"\* \* \* neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without the State of Florida if the public performance for profit of such music may be reproduced or performed within the State of Florida."

The penalty section of the statute, Section 8, provides

"\* \* \* a fine of not less than \$50.00 or more than \$5,000 and by imprisonment in the penitentiary not less than *one* or more than ten years, or by *either* such fine or imprisonment."

The impressive thing about this feature of the statute is its flexibility. It must be obvious—to all but those who refuse to see—that the Legislature realized that violations of this Act would differ very widely in reprehensibility. For that reason it left to the court a wide margin of discretion; for offenses of minor character or those entered into without willful intent, the total punishment might amount to no more than a \$50 fine with no imprisonment. Thus, in the usual course of judicial discretion, the severer penalties would be reserved for those whose wrongful acts were aggravated.

by intentional disregard of the statute, or by repeated offenses.

In the supporting affidavit of the plaintiff Gene Buck (R. 104) he states that in 1936 the Society received \$3,200,000 from its contracts with broadcasters alone. In paragraph 36 of the bill (R. 32, 33) the allegation is made that each of the three publisher plaintiffs received during the year 1936 as net compensation from public performance rights in excess of \$50,000; and that each of the individual plaintiffs during that year received in excess of \$5,000. Realizing that there are 123 publisher members of the Society, and 1000 author and composer members, it is easy to see that the financial resources of the Society would not be materially threatened by such penalties as might be suffered under the Florida statute during the testing out of its constitutionality.

The cases relied on by the plaintiffs in the lower court do not bear out their contention as to the excessive character of the penalties of the Florida statute.

*Pierce v. Society of Sisters*, 268 U. S. 510 involved an Oregon statute providing compulsory attendance of children at the public schools in the district in which they resided. It provided penalties against non-complying parents and guardians, a fine of not less than \$5 nor more than \$100, imprisonment in the county jail not less than 2 nor more than 30 days, or both fine and imprisonment. The effect of the statute would have been undoubtedly to destroy the profitable business of the private schools in that state. The decision of this Court was specifically rested on that ground (pp. 534, 536), and not at all upon the size of the penalty. The penalty was applicable, not to the plaintiff schools, but to parents

who did not send their children to the public school. Obviously there is no analogy between this case and the case at bar.

*Ex Parte Young*, 209 U. S. 123, was a Minnesota statute fixing maximum freight and passenger rates which could be charged for intra-state traffic. The penalties were as follows: exceeding maximum freight rates, first offense, not less than \$2,500 nor more than \$5,000, and for second and subsequent offenses, not less than \$5,000 and not more than \$10,000; exceeding maximum passenger rates was made a felony punishable by a fine not exceeding \$5,000 or imprisonment not exceeding 5 years or both. Each shipment of freight and each carriage of a passenger at greater than the prescribed rate would constitute a separate offense and, when one considers the enormous volume of traffic carried by railroads, it is easy to see that a solvent carrier might be rendered bankrupt by the result of a few days operation in Minnesota.

*Smyth v. Ames*, 169 U. S. 466, even more strikingly illustrates plaintiffs' inability to make an accurate comparison where their own interests are involved. That also was a statute fixing maximum railroad rates for intra-state commerce (Nebraska). It provided penalties as follows:

First offense—not less than \$1,000 nor more than \$5,000

Second offense—not less than \$5,000 nor more than \$10,000

Third offense—not less than \$10,000 nor more than \$20,000

Each subsequent offense—a fixed fine of \$25,000.

In addition each individual shipper was given an action for damages, including attorney's fees.

**F. In Passing Upon this Statute the Court will not Consider the Attempts of the Appellees to Impugn the Motives of the Florida Legislature in Enacting It.**

In paragraph 32 of the bill (R. 29) it is charged that the statute is not a reasonable exercise of the police power but a pretext under which the State is attempting to usurp the powers of Congress with respect to copyrights,

“ . . . and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.”

A large part of the lengthy supporting affidavit of plaintiff Gene Buck is taken up with similar attempts

to impugn the motives of the Legislature in enacting the statute. See especially the following (R. 125, 126):

"The State Statute was introduced in the Senate by Hon. John R. Beecham, State Senator, who is also the chief executive of radio broadcasting station WJNO, at West Palm Beach, Florida.

"The Statute was introduced for the private benefit of the Florida radio broadcasters and hotel owners, who have powerful local trade associations. Senator Beecham is one of the members of the executive committee of the Association."

The Buck affidavit is also replete with similar attempts to smear legislation of like character adopted in Montana and Nebraska. Doubtless the brief which appellees will file in this Court will contain similar matter.

We are confident that this Court will not be interested in weighing or considering charges of this character. As was said in *Southwestern Oil Co., v. Texas*, 217 U. S. 114, 126:

"But we will not speculate as to the motives of the state, and will assume—the statute, either upon its face or by its necessary operation, not suggesting a contrary assumption—that the state has in good faith sought, by its legislation, to protect or promote the interests of its people."



**G. Section 12 is an Effective Provision to Save the Remainder of the Statute in Case any Particular Provision Should be Held Void.**

Section 12 is a clause frequently used in legislative enactments providing that the unconstitutionality of any part of the Act shall not affect the remaining portion.

Appellants believe it has been demonstrated in this brief that Section 1 and its dependent sections are all valid enactments and that the remaining sections through Section 11-B are withdrawn from the consideration of the Court in this case, because dissociated from the duties laid upon the state prosecuting officers or because involving merely procedural questions which may never arise. We urge, however, that if, contrary to our contention, some portion of the statute other than Section 1 should be held unconstitutional, Section 12 will be fully operative to rescue the remainder.

This Court has several times been called upon to determine the effect of such a saving clause. In *Williams v. Standard Oil Co.*, 278 U. S. 235, the Court passed upon the validity of a Tennessee statute which contained a saving clause similar to Section 12 of the Florida statute. The rule there laid down may be briefly summarized as follows:

(a) In the absence of such a legislative declaration the presumption is that the Legislature intends the act to be effective as an entirety (p. 241).

(b) If there be such a declaration, its effect is (p. 242):

“ \* \* \* to create in the place of the presumption just stated the opposite one of separability.

That is to say, we begin in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains."

(c) In either event the presumption is a rebuttable one. This principle was applied in *Highland Farms Dairy v. Agnew*, 300 U. S. 608, with regard to a Virginia statute containing a clause similar to the one at bar.

Applying the principle to the Florida statute, it is readily seen that the dominant motive of the Legislature was to prevent price-fixing combinations with respect to public performance rights in copyrighted music performed in Florida (Section 1), and that the other sections which refer to Section 1 are merely tools designed to effectuate that purpose. Section 1 being a valid exercise of the State's police power, in this case it will be impossible for the appellees to meet the burden of overthrowing the presumption of separability which attaches to all of the sections which refer to Section 1, viz., Sections, 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9, or the like presumption which attaches to Sections 10-A, 10-B, 11-A and 11-B, which, while not expressly conditioned upon Section 1, are obviously dependent upon it.

*A fortiori* the presumption attaches to Sections 2-A, 2-B and 6 which relate to subjects totally dissociated from the main purpose of the Act.

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INTERLOCUTORY INJUNCTION. (Assignment of Errors 7-9 incl.)**

Conceding, *arguendo* merely, that the District Court had jurisdiction as a Federal Court to take the case; that equitable aid could properly be granted to such a combination as effected by the plaintiffs in this case; and that there is doubt as to the constitutionality of the Florida statute—appellants still urge that the District Court abused its discretion in granting the temporary injunction for the following reasons:

##### **A. There is no Reasonably Grounded Apprehension of Irreparable Injury Such as Would Justify the Granting of a Temporary Injunction.**

The bill alleges (par. 34, R. 29, 30) that the defendants and each of them have threatened to, and will, enforce the State statute against the members of the Society in the event that they "refuse to accept or submit to a system of compulsory licensing"; and that the defendants have threatened to enforce the penal and confiscatory provisions of the statute against the plaintiffs and their associates performing any of the acts denounced by the statute.

These allegations are not supported by any statement as to how, when, where or to whom such threats were made, and doubtless this detail was omitted for the best of reason.

At the time of granting the injunction the District Court had before it the affidavit of Cary D. Landis, then Attorney General of Florida, the state officer whose direction and approval must be obtained before any of the other defendants might bring an action under this statute, either civil or criminal (Aff. Landis, R. 211; Statute, Sec. 9). In this affidavit the Attorney General alleges unqualifiedly that no violations of this statute have been called to his attention, and, upon information and belief, that there have been no such violations; positively that he has not, nor has he authorized anyone on his behalf, to threaten anyone with prosecution under this statute.\*

*In the light of these statements by the chief law enforcement officers of the State of Florida, it is impossible to lend any credence to the statement made in the bill to the effect that the Attorney General and each of the fifteen State's Attorneys of Florida have threatened to bring such action.*

Other facts also before the District Court indicated strongly the absence of any ground of apprehension of immediate and irreparable injury to plaintiffs:

1. The statute became effective June 9, 1937, nearly eight months prior to the institution of this suit (February 7, 1938) and it is inconceivable that had this apprehension of serious injury been actually entertained,

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\*This affidavit has since been supplemented by the affidavit to like effect, made by Judge Landis' successor in office, George Couper Gibbs (see "Motion of Appellant State's Attorneys to Vacate Decree and Direct Dismissal of Bill of Complaint", pp. 12, 13).

plaintiffs would have waited eight months before bringing this suit.

2. Affidavits of broadcasters tendered in connection with defendants' motion to deny the hearing show that the general course of action on the part of the broadcasters since the enactment of the statute had been to forward to the Society regular remittances under their license agreements, or to offer to do so, but the Society has declined to accept all such remittances.

**B. The District Court granted the Interlocutory Injunction When it did not Persuasively Appear from any Finding of Fact and Conclusions of Law that the Unconstitutionality of the Statute is Reasonably Free from Doubt.**

The District Court's order granting the temporary injunction was entered April 4, 1938 (R. 270). With it there were filed no findings of fact and conclusions of law, as required by Equity Rule 70½ as amended November 25, 1935, but merely a "Memorandum Opinion" (R. 268). This memorandum opinion after an extremely brief analysis of the statute concluded with the following paragraphs (R. 269):

"The bill alleges that the enforcement of this Act will violate rights granted to them by the copyright Act of Congress; that it is in violation of the Federal Constitution and impairs the terms of certain existing contract held by these plaintiffs.

"The cause is before this Court upon application for interlocutory injunction; upon the bill



of complaint, affidavits filed therewith and upon motion to dismiss the bill of complaint.

"It is alleged that the defendants have threatened to and will enforce the provisions of this Act to the irreparable injury of plaintiffs unless such injunction order is issued.

"It appearing to the Court that plaintiffs have shown that great damage will be inflicted upon them if preliminary injunction is not granted, and that there is grave doubt of the constitutionality of the Act;

"It is considered by the Court that an order be entered granting such interlocutory injunction and that the motion to dismiss the bill be denied."

The order allowing appeal was entered by the Court April 25, 1938 (R. 274). Defendants' jurisdictional statement was filed April 25, 1938 (R. see "Statement as to Jurisdiction"), including the "Memorandum Opinion" above mentioned. In the jurisdictional statement (pp. 6, 7) specific reference was made to the failure of the District Court to enter findings of fact and conclusions of law as directed by the Equity Rule.

It was not until May 17, 1938, that the District Court entered the "Findings of Fact and Conclusions of Law", which now appear in the Record at page 276. These facts are recited not merely because of a technical infraction of the Equity Rule, but because, taken as a whole, they indicate to us that at the time of the granting of the injunction, the specially constituted three-judge District Court had not bestowed upon the question of the con-

stitutionality of the Florida statute the deliberation which this Court by the amendment of November 25, 1935, to Equity Rule 70½ intended should be bestowed.

In *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82, the three-judge District Court had enjoined an order of the Wisconsin Railroad Commission fixing rates without rendering an opinion. On appeal this Court set the decree aside and remanded the cause to the District Court with direction to state its findings of fact and conclusions of law. In its opinion (p. 83) the Court said:

“In *Lawrence v. St. Louis-San Francisco R. Co.*, 274 U. S. 588, 596, 71 L. ed. 1219, 1224, 47 Sup. Ct. Rep. 720, the court said: ‘The importance of an opinion to litigants and to this court in cases of this character was pointed out in *Virginian R. Co. v. United States*, 272 U. S. 658, 675, 71 L. ed. 463, 472, 47 Sup. Ct. Rep. 222. The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.’ ”

The *Maxcy* case was dealing with a final decree, but later a similar question arose with reference to an interlocutory injunction such as was issued in the case at bar.

In *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U. S. 67, appeal was taken from an interlocutory injunction against a rate order

of the state Public Service Commission. No opinion was rendered by the District Court, but there was a statement in the decree for injunction to the effect that the rates "would result in the confiscation of the property" of the complainants, and would deprive it of its property "without compensation and without due process of law". That finding appears to be a considerably stronger statement than the statement in the Memorandum Opinion in the case at bar (R. ....), "that there is grave doubt of the constitutionality of the Act."

This Court, in its opinion, cited various prior decisions requiring the findings of law and fact in such cases, including the Maxcy case, *supra*, then added (p. 70):

"These reasons exist, and are not the less imperative, when the injunction is interlocutory. *Lawrence v. St. Louis-San Francisco R. Co.* 274 U. S. 588, 71 L. ed. 1219, 47 S. Ct. 720, *supra*. It was to insure careful and deliberate action upon such interlocutory applications that the Congress has required that they should be heard before three judges. That requirement applies only when an interlocutory injunction is sought."

It was following the Wisconsin Telephone case, *supra*, that this Court in 1935 amended Equity Rule 70½ so as to include specifically the requirement for findings of fact and conclusions of law in interlocutory injunctions.

In no sense of the word does the Memorandum Opinion of April 4, 1938, conform to the requirements of the rule. The opinion does not even find it to be true that the defendants have threatened to enforce the Act. It merely states "it is alleged that the defendants have

threatened, etc." While stating that there is grave doubt of the constitutionality of the Act, it fails to point out a single particular which might give rise to such a doubt. The Findings of Fact and Conclusions of Law filed May 17, 1938, may assist this Court in the performance of its appellate duties—that is not for us to say.

Even a cursory examination of the document shows it to be merely a condensation of the bill of complaint. The findings of fact are only conclusions, for the most part erroneous and insufficient to cover the issues before the Court. To a considerable extent they deal with Sections 2-A, 2-B and 6 of the Act, which we have already demonstrated are not properly under consideration in this action. As illustrative of the incompleteness and the incorrectness of these findings, we cite the following:

Finding of Fact No. 2. Here the Court found that the complainant Society constituted a substantial number of persons who own or control copyrighted musical compositions, but it failed to make any reference in its findings as to the monopolistic activities of the Society which plainly appeared in the record.

The findings do not refer to the fact that the Society refuses to grant a license for less than its entire portfolio of music; or the fact that it requires as a prerequisite of membership an assignment of public performance rights in all copyrighted music owned or controlled by the members for the life of the contract; or the fact that in fixing royalties for radio stations it discriminates most oppressively against stations which are not controlled by a newspaper. Had the Court considered these uncontroverted facts,—all shown to be such in Part II

of this brief—we doubt that it would have granted the Society injunctive relief.

Finding of Fact No. 4. Here the Court says that the action is one in equity arising out of the Constitution of laws of the United States and the matter in controversy exceeds \$3,000 exclusive of interest and cost, yet nowhere in the remainder of the findings of fact or conclusions of law is shown the value of complainants' business, the amount of business transacted within the State, the amount it cost the complainants to operate within the State, or the difference between operating under the statute and operating free of its restrictions.

Findings of Fact Nos. 5 and 6. These findings illustrate the failure of the Court to correctly determine the scope of the statute and the duties of the State enforcement officers thereunder. These findings are based exclusively on the theory that the defendants are charged under the statute with enforcing the provisions of Sections 2-A and 2-B—a totally unwarranted construction of the law, as demonstrated in Part III of this brief.

Finding of Fact No. 7 is clearly erroneous, because the thing penalized under the statute (Sec. 8) is not the making of the contract outside of the State of Florida, but the performance of the contract and the collection of moneys thereunder in the State of Florida.

Finding of Fact No. 8 is also erroneous, because classification in itself is not unlawful. The Court here overlooked entirely the factual differences in the situation of public performance rights with respect to copyrighted matter and common law ownership of unpublished works—differences so striking as plainly to mark the



copyrighted music performance rights alone as a proper subject for legislative action (supra, Part III).

Finding of Fact No. 9. This finding is so confusedly worded as to be practically unintelligible.

Finding of Fact No. 10 fails completely to take into consideration the elasticity of the penalties provided by Section 8 of the statute.

We respectfully submit that although the findings are called findings of fact and conclusions of law, they are in reality but a brief summary of the bill of complaint. The mere fact that the document filed is called "findings of fact and conclusions of law" does not make it that. The contents of this paper are only conclusions, and do not in any manner conform to Equity Rule 70 $\frac{1}{2}$ , as interpreted by this Court in *Interstate Circuit, Inc., v. United States*, supra.

With the permission of the District Court, appellants were enabled to amend their statement as to jurisdiction by a footnote which took cognizance of the findings of May 17, 1938, but certainly what was intended by the Equity Rule, as well as the decisions noted above, was also to give to the State affected by the injunction the benefit of that deliberative consideration which only the preparation of findings *before* the granting of injunction would insure.

Perhaps the decision of the District Court would have been the same had it complied with the spirit of these decisions and the Rule. Be that as it may, appellants urge that in the light of the argument submitted above the need for nullifying the Act of the Florida Legislature has not been "persuasively shown" by the findings of May 17, 1938. *Railroad Commission v. Maxcy*, supra.

# CONCLUSION

Appellants urge that under the facts and law of this case as set forth in the preceding pages of this brief, the order appealed from is clearly erroneous and should be reversed, with direction to dismiss the bill of complaint.

Respectfully submitted,

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TYRUS A. NORWOOD,  
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**APPENDIX I****CHAPTER 17807****SENATE BILL NO. 679**

AN ACT Declaring to be an Unlawful Monopoly and Its Purposes to be in Restraining of Trade, any Combination of Persons, Firms or Corporations Which Determine the Amount of Money to be Paid to it or to Its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Compositions, When Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify Upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare That any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made With any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Nonenforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Pro-

tection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement, Radio Broadcasting and Radio Receiving and Radio Re-Broadcasting Station Affiliated with other Persons, Firms or Corporations Outside of the State of Florida, Against the Collection of License Fees or Other Exactions by such Out of the State Affiliates for or on Account of any Combination Herein Declared Unlawful; To Provide All Liability for any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription, or Sound Producing Apparatus, or by Personal Performance Coming Outside of the State of Florida and Used Herein to Rest Exclusively on the Out of State Person, Firm or Corporation Originally Sending the Same Into This State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, Under the Direction of the Attorney General, Upon the Complaint of any Party Aggrieved by any Violation Hereof to Proceed to Enforce the Members, Agents or Representatives; to Empower any Party Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide That the Terms of this Act Shall be Cumulative; to Provide that any Part of this Act Declared Illegal Shall not Affect the Validity of the Remaining Parts Hereof.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:**

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns,

of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representatives of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties, shall not be collected in any Court within the boundaries of this State; and such



collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over, through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical rec-

ords, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

**SECTION 2-B.** In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm, or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

**SECTION 2-C.** Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

**SECTION 3.** All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act: and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

**SECTION 4-A.** Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

**SECTION 4-B.** When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leas-

ing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm, or corporation, who owns, operates, or manages any theatre, or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within

this State; shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or



other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm, or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted

Vocal or instrumental musical compositions, thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

SECTION 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in

Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or management or other official representative upon whom service might otherwise be made upon such combination within this State.

SECTION 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees of other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

SECTION 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

SECTION 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General to institute proceedings, civil or criminal, or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case, and pending such petition and before final decree the Court may at any time make such temporary restraining order as shall be deemed equitable.

SECTION 10-A. Any person firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs; including reasonable attorney's fees to be fixed by the Court in such action.

SECTION 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly,

as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the Defendant or Defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

SECTION 11-B. If, said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a



fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorneys fees.

SECTION 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason held or declared to be unconstitutional, imperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

SECTION 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

SECTION 14. This Act shall become effective immediately upon its becoming a law.

APPROVED by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.



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CHARLES ELMORE HOPLEY  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 276

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA ET AL.,

*Appellants,*

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

REPLY BRIEF OF APPELLANTS.

GEORGE COUPER GIBBS,

*Attorney General of Florida;*

✓ TYRUS A. NORWOOD,

*Assistant Attorney General of Florida;*

LUCIEN H. BOGGS,

ANDREW W. BENNETT,

*Counsel for Appellants.*



SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF FOR APPELLANTS.

I.

**Appellees Have Failed to Show That the Matter in Controversy is in Excess of \$3,000.00.**

The appellees criticize and attempt to distinguish the cases of *McNutt v. General Motors Acceptance Corporation*, 298 U. S. 178; *KVOS, Inc. v. Associated Press*, 299 U. S. 269; and *Pope v. Blanton*, 299 U. S. 521, but the same vice that infected the bills of complaint in those cases is present in the bill now before the Court. Nowhere has it been shown what it costs the appellees individually or collectively to do



business in the State of Florida, either with or without the regulations of the statute.

Appellees insist that because the court below found the matter in controversy exceeded three thousand dollars (\$3,000.00), exclusive of interest and costs, this was sufficient to show Federal jurisdiction. Yet they failed, and the findings of fact (R. 276) failed to point out any facts in the record supporting this conclusion. Although the bill alleges that in 1936 the Society collected the sum of \$59,306.81 from licensees for their music in the State of Florida (R. 25), nowhere is it alleged how much it cost the Society to do business in the State in 1936 or any other year. It might have cost the appellees two hundred thousand dollars a year to do business in Florida. Without this essential allegation the jurisdictional amount is not made to appear. The statute prohibits no one from doing business within the State; it merely regulates the mode of doing business. *McNutt v. General Motors, supra*.

Appellees urge (p. 24) that the cause of action is joint by reason of a statute of the State of New York. The legislature of a State cannot by its fiat confer upon persons having separate rights the power to combine those rights in order to give a Federal court jurisdiction, any more than individuals can aggregate their separate claims in order to establish jurisdiction—a doctrine unequivocally denied by this Court in *Pope v. Blanton, supra*, discussed in appellants' brief, pp. 22 and 23. However, assuming it to be a joint action, still no jurisdictional amount has been shown because nowhere is it alleged what it cost the members of the Society jointly to operate in Florida.

In a desperate, but futile, effort to show jurisdiction, appellees (brief p. 35) insist that the loss each year by reason of the Florida statute, to the three publisher appellees is in excess of \$50,000 each; and the loss each year to the seven author and composer appellees is in excess of \$5,000

each, a total of \$185,000.00. And yet, for all of its 45,000 author, composer and publisher members and affiliates (R. 24) The Society collected in Florida only \$59,306.81 in 1936.

As a matter of fact, appellees' estimated loss stated in their brief is not based upon receipts from Florida, but is based upon income derived from their activities throughout the entire world (R. 32). The record is completely silent as to the net income of any of appellees derived from Florida operations.

As a further illustration of the confusion into which appellees' efforts to establish Federal jurisdiction have plunged them, we quote the following from page 17 of their brief:

"Since appellees *do not do business* in the State of Florida, the Statute would enable the State Courts to secure jurisdiction over them so as to deprive them of their property and subject them to the penalties of the Statute, without being personally present within the State."

If appellees do no business in Florida, by what stretch of the imagination can it be asserted that individually or collectively they lose \$3,000, or any other sum, because of the restrictions of the Florida statute?

## II.

### **Appellees' Brief Confesses the Monopolistic Activities of the Society.**

Appellees' brief, instead of denying the price-fixing activities of the Society, confesses those activities and seeks to justify them by a plea of necessity (Appellees' brief, pp. 3-5, incl.).

The unsoundness of this position is fully demonstrated in appellants' main brief (pp. 47-49 incl.). Defenses that their method is necessary in order to protect copyright owners

against piracy of their property by users of copyrighted music (the remedy is contained in the Copyright Act itself by suit for infringement—see *United States v. Patterson, et al.*, 205 Fed. 292, 295-300; *Patterson et al. v. United States*, 222 Fed. 399, 645-647); that the method results in lower license fees (see *United States v. Trenton Pottery Company, et al.*, 273 U. S. 392, 397-398); that the method is desired by the users of copyrighted music themselves and the contract terms written by them (see *Paramount Famous Lasky Corp. et al. v. United States*, 282 U. S. 30, 42-44); that the method of licensing does not suppress all competition between copyrighted musical compositions or the owners thereof (see *Paramount Famous Lasky, supra*, p. 44), and all similar defenses are of no avail. “The interest of the public in the preservation of competition is the primary consideration.” (*Paramount Famous Lasky, supra*, p. 44).

Much is made by appellees of the alleged selfish and dishonest motives of the users of copyrighted music in promoting the enactment of the statute (Appellees’ brief, pp. 5-9, incl.). In their desperate effort to evoke a sympathetic attitude from the Court, they refer (p. 9) to pages 116-119 of the Record as demonstrating these improper motives on the part of the entertainment industries. Actually these pages of the Record refer exclusively to alleged activities of the amusement industries in *Nebraska* and have no relevance to the Florida legislation. If the whole situation is dispassionately considered, it is apparent that the objection of the entertainment industries is not to the payment for the privilege of public performance for profit, but definitely is directed at being deprived, through the concerted action of appellees, of their inalienable right purchase their necessary supplies of music in a competitive market, free from price-fixing restraints of a monopoly dominated by a self-perpetuating board of directors.

The justice of this complaint of the entertainment industries is well illustrated by the discrimination practiced by the Society in giving licenses to newspaper-controlled broadcasting stations upon terms far more favorable than those accorded to stations not thus controlled. This fact is admitted by appellees' brief (p. 50), where attempt is made to gloss over the discrimination by the bald statement that—

"These two types of contracts are the standard forms of contracts. They are entirely different. It cannot be said that either one discriminates against the other."

These discriminations are glaringly apparent upon the face of the respective agreements (R. 70, and 243; see also affidavits, Tison R. 212, and Mitchell, R. 242).

Appellees endeavor to obtain sympathy by reference to an investigation of their activities by the Department of Justice in 1926, but neglect to state all the facts (Appellees' brief pp. 5-6). The dismissal by the Department of Justice in August 1926, of the complaint against the appellee Society subsequently culminated on August 30, 1934, in the institution of an action against appellees charging violations of the United States Anti-trust laws. (R. 222, *et seq.*). This action is pending in the United States District Court for the Southern District of New York, Equity No. 78-388.

### III.

**Appellees Have Failed to Recognize the Fact That the State Prosecuting Officers are Not Charged With the Enforcement of Sections 2-A, 2-B and 6 of the Florida Statute; Consequently the Validity of These Sections Cannot be Tested in This Suit.**

Appellants' main brief (pp. 56-62, incl.) demonstrates that Sections 2-A, 2-B and 6 of the statute are wholly disconnected from Section 1 and its dependent sections; that

no duties are laid upon the State enforcement officers with respect to these three sections; that the validity of these sections can be tested only in civil suits between the owners of public performance rights and those who are claimed to be infringing upon those rights. Consequently, the consideration of those sections is moot so far as the instant case is concerned.

This all important distinction is entirely disregarded by appellees in their bill of complaint, and in their brief. When the statute is thus separated into its component parts, it is readily seen that the only portions of the law with which this case is concerned are those denouncing as unlawful the price-fixing activities of the Society practiced in the State of Florida. Thus, it is clear that, so far as concerns the instant case, the Legislature of Florida was acting within its police powers in forbidding such activities. *Allen v. Riley*, 203 U. S. 347; *Patterson v. Kentucky*, 97 U. S. 501.

Respectfully submitted.

GEORGE COUPER GIBBS,  
*Attorney General of Florida;*

TYRUS A. NORWOOD,  
*Assistant Attorney General of Florida;*

LUCIEN H. BOGGS,  
*Jacksonville, Florida;*

ANDREW W. BENNETT,  
*Washington, D. C.,*  
*Counsel for Appellants.*



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**SUPREME COURT OF THE UNITED STATES**

**CHARLES EDMOND CHORLEY**  
**CLERK**

**OCTOBER TERM, 1938**

**No. 276**

**CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL  
OF THE STATE OF FLORIDA, ET AL.,**

*Appellants,*

*vs.*

**GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF FLORIDA.**

**MOTION OF APPELLANT STATE'S ATTORNEYS  
TO VACATE DECREE AND DIRECT DISMISSAL  
OF BILL OF COMPLAINT.**

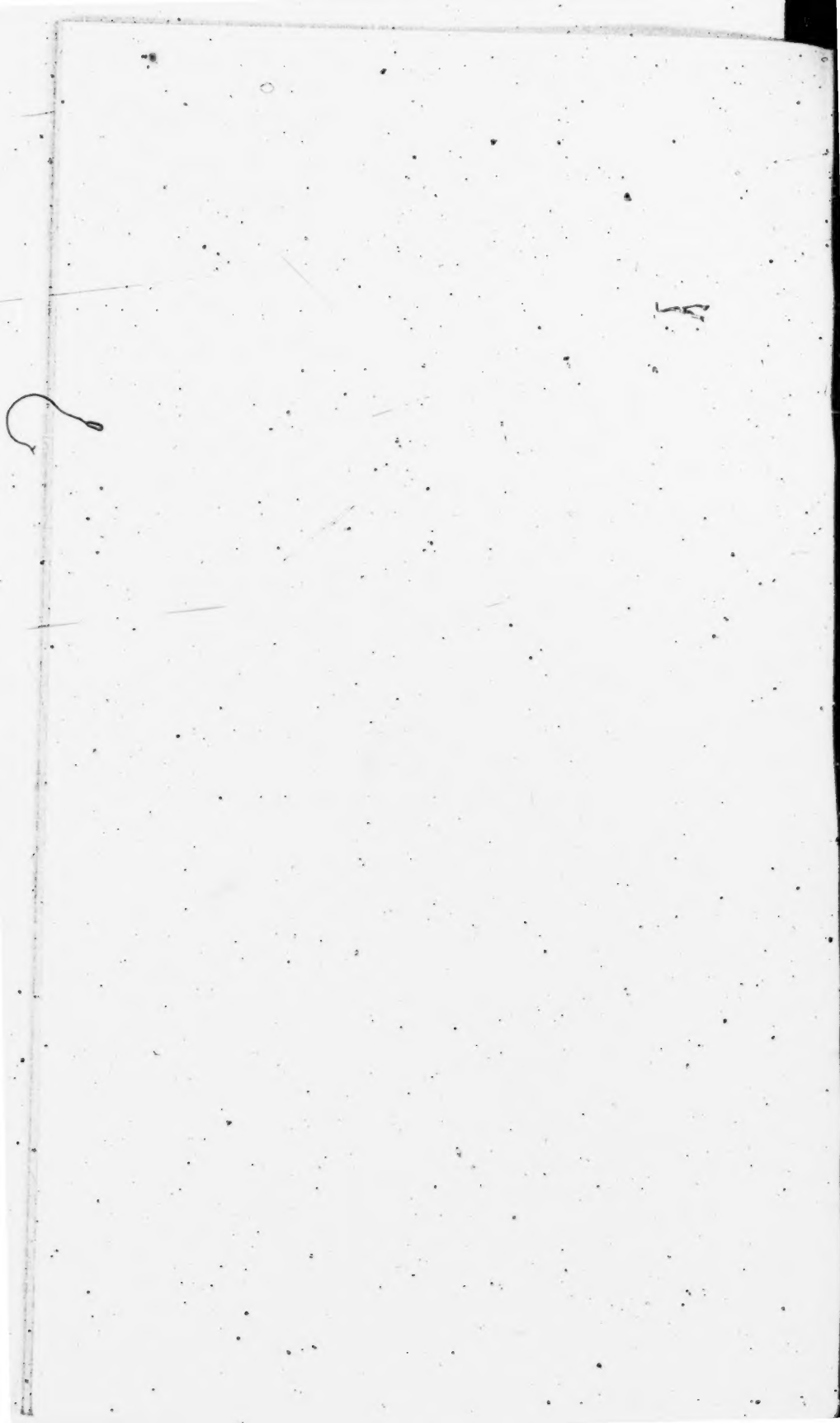
**TYRUS A. NORWOOD,**  
*Assistant Attorney General of Florida;*  
    **LUCIEN H. BOGGS,**  
    **ANDREW W. BENNETT,**  
*Counsel for Appellants, State's Attorneys.*



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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1938

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No. 276

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vs.

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AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

*Appellees.*

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**MOTION OF APPELLANT STATE'S ATTORNEYS  
TO VACATE DECREE OF LOWER COURT AND  
DIRECT DISMISSAL OF BILL OF COMPLAINT.**

---

The appellant State's Attorneys being the sole surviving appellants in said cause respectfully move the Court to vacate the decree of the lower court and direct the District Court for the Northern District of Florida to dismiss the bill of complaint, heretofore filed in this cause, for want of the necessary party, and for grounds of this motion, movants show as follows:

1. The death of the said Cary D. Landis May 10, 1938, occurred subsequent to the entry of order allowing appeal to this Court April 25, 1938; thereafter on May 31, 1938, the appellant State's Attorneys as defendants in the court

below filed in the District Court suggestion of the death of said Landis and contemporaneously therewith filed their motion to dismiss suit for want of proper parties and on the ground that the question involved in the suit had become moot. A certified copy of said suggestion of death and motion are hereto attached, marked Exhibits "A" and "B" respectively, made part hereof.

2. Thereafter on July 11, 1938, the appellees as plaintiffs in the court below filed in said District Court their motion for leave to file supplemental bill and with said motion tendered a proposed supplemental bill wherein they sought to implead as a party defendant George Couper Gibbs, the successor in office as Attorney General of the State of Florida. A certified copy of said motion is hereto attached, marked Exhibit "C", made part hereof.

3. Thereafter on July 11, 1938 the said George Couper Gibbs filed in said District Court his special appearance and objections to being made party defendant to said cause, certified copy of which with its supporting affidavit is hereto attached, marked Exhibit "D", made part hereof; and on the same day the defendant State's Attorneys filed their objections to the plaintiffs' motion for leave to file supplemental bill, a certified copy of which is hereto attached, marked Exhibit "E", made part hereof.

4. Thereupon on the date last mentioned, July 11, 1938, said cause came on to be heard before the special statutory three-judge court at Pensacola, Florida, upon the several motions, the special appearance and objections hereinabove referred to and was argued by counsel whereupon said court on said date entered its order denying the motion of the defendant State's Attorneys to dismiss the cause, and denying the motion of the plaintiffs for leave to file supplemental bill impleading George Couper Gibbs as party defendant in the place of said Cary D. Landis, deceased. A certified

copy of said order is hereto attached, marked Exhibit "F", made part hereof.

5. That under Section 9 of the Florida statute attacked by the bill of complaint in this case, viz., Chapter 17807, Laws of Florida, 1937, it is specifically provided that all proceedings, civil or criminal, for the enforcement or violation of said statute are committed to the exclusive direction of the Attorney General of the State of Florida and that without such direction from him none of the State's Attorneys is empowered to take any action whatever. Therefore, the State's Attorneys are not necessary parties and the Attorney General is the only necessary party to this action. A copy of said statute is hereto attached, marked Exhibit "G", made part hereof.

6. The District Court correctly decided that the said George Couper Gibbs could not be impleaded as a party defendant in the face of his objections and supporting affidavit, (*Ex parte La Prade*, 289 U. S. 444.) In the absence of the official occupying the office of Attorney General of the State of Florida the controversy therefore became moot and the suit should be dismissed. (*Warner Stock Company v. Smith*, 165 U. S. 28; *Chandler v. Dix et al.*, 194 U. S. 590; *Pullman Company v. Croom*, 213 U. S. 571; *Pullman Company v. Knott*, 243 U. S. 447; *Bernardin v. Butterworth*, 169 U. S. 600.)

7. The defendants have appealed from the order of the special statutory three-judge court granting a temporary injunction restraining the enforcement of the above mentioned statute and have lodged the transcript of record on said appeal in this Court. This record is very voluminous and it will cost approximately \$2,000.00 to have same printed, in addition to the cost of printing briefs and traveling expenses of counsel incurred in attending Court for the argument of the appeal.

8. By granting this motion not only will the above described expense be saved to the State of Florida, but this Court will conserve its own time and effort which in that event need not be devoted to the consideration of a case which has become moot under the authorities above cited.

TYRUS A. NORWOOD,  
*Assistant Attorney General*  
*of the State of Florida,*  
LUCIEN H. BOGGS,  
ANDREW W. BENNETT,  
*Attorneys for Defendant*  
*State's Attorneys.*

**EXHIBIT A.**

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.

Equity. No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, etc., *et al.*,  
Complainants,

v.

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, Defendants.

**SUGGESTION OF DEATH.**

The defendant State's Attorneys in the above entitled  
cause, being the sole surviving defendants therein, respect-  
fully suggest to the Court the death on May 10, 1938, of their  
former co-defendant Cary D. Landis, who was named party  
defendant in said action, individually and as Attorney Gen-  
eral of the State of Florida.

(S.)

TYRUS A. NORWOOD,  
*Assistant Attorney General,*

(S.)

ANDREW W. BENNETT,

(S.)

LUCIEN H. BOGGS,

*Solicitors for Defendant*

*State's Attorneys.*



**EXHIBIT B.****IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.**

Equity. No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
Complainants,

v.

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, Defendants.

**MOTION TO DISMISS SUIT.**

The defendant State's Attorneys, being the sole surviving defendants in said cause, move the Court for an order dismissing said suit for want of proper parties upon the following grounds:

1. The defendant Cary D. Landis, named as party defendant to said cause, individually and as Attorney General of the State of Florida, died May 10, 1938, as shown by suggestion of death filed co-temporaneously herewith. While said defendant Cary D. Landis was named as defendant in the bill of complaint in said cause, both individually and officially as Attorney General of the State of Florida, yet in fact and in law, this suit was actually brought against him only individually, and, being based solely upon alleged wrongful acts done or threatened to be done under color of his office, said suit abated as to him upon his death.

2. Under the State statute attacked by this suit, viz., Chapter 17807, Laws of Florida, 1937, the power of enforcing *vel non*, said statute both civilly and criminally is lodged specifically and solely with the Attorney General of said State, said statute providing that the State's Attorneys shall proceed in civil and criminal prosecutions alike only under the direction of the Attorney General; the surviving

defendants have not been directed or authorized by the present incumbent in the office of Attorney General to bring any such actions, civil or criminal, and being powerless to act in said matters without the direction of the Attorney General, the controversy involved in said suit has become moot.

3. No attempt has been made by the plaintiffs to implead the successor in office of the said Cary D. Landis, or to bring him in as a party defendant; nor could such proceedings hereafter successfully be invoked by the plaintiffs.

4. In the absence of the person occupying the office of the Attorney General of the State of Florida, no final decree could effectively be rendered in this cause.

5. The surviving defendants were not and are not necessary parties to this suit, since an injunction of this Court restraining the person occupying the office of Attorney General from bringing, directing or authorizing any such suits civil or criminal would have fully protected the plaintiffs against the alleged wrongs, even without the presence as parties defendant of the several State's Attorneys of the State of Florida. The relief sought against the surviving defendants by the bill of complaint herein was incidental only, by way of restraining them from executing the orders of their official head.

And request is hereby made of the Presiding Judge of this Court to convene three judges to hear this motion for the dismissal of said cause as provided by Section 380, Title 28 of the U. S. Code as amended.

Dated this 31 day of May, 1938.

(S.)

TYRUS A. NORWOOD,  
*Assistant Attorney General;*

(S.)

ANDREW W. BENNETT,

(S.)

LUCIEN H. BOGGS,

*Solicitors for Defendant*

*State's Attorneys.*

**EXHIBIT C.**

IN THE UNITED STATES DISTRICT COURT, NORTH-  
ERN DISTRICT OF FLORIDA, GAINESVILLE DI-  
VISION.

Equity. No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
Complainants,

*v.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, Defendants.

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BILL.**

Now come the complainants in the above entitled cause,  
by their undersigned counsel, and move the Court for leave  
to file and serve a supplemental bill of complaint, with  
prayer for supplemental subpoena and other relief, in the  
above entitled cause, and say:

1. On the 7th day of February, 1938, complainants filed  
their bill of complaint in this Court against the defendants,  
Cary D. Landis, individually and as Attorney General of the  
State of Florida, and the various State Attorneys for the  
respective Judicial Circuits in the State of Florida, for an  
injunction, interlocutory and permanent, enjoining the de-  
fendants from enforcing Senate Bill No. 679, of the Acts  
of Florida for 1937, and for the purpose of having said  
statute declared unconstitutional, null and void.

2. Thereafter, on the 3rd day of March, 1938, this cause  
came on for hearing before a Statutory Three Judge Court,  
upon the application of the Complainants for an interlocu-  
tory injunction, and the motion of the defendants to dismiss  
the bill of complaint. On the 5th day of April, 1938, the  
Court entered an order granting the application for an inter-  
locutory injunction, enjoining the defendants from enforce-  
ing said statute, and denying the motion of the defendants  
to dismiss the bill of complaint.

3. On the 25th day of April, 1938; the defendants petitioned for the allowance of an appeal from said order of April 5th, 1938, to the Supreme Court of the United States, which said appeal was allowed, and is now pending.

4. Thereafter, on the 10th day of May, 1938, the defendant, Cary D. Landis, who was named a party defendant in said action, individually and as Attorney General of the State of Florida, departed this life, and on the 16th day of May 1938, George Couper Gibbs became, and is now, the duly appointed, qualified and acting Attorney General of the State of Florida.

5. Said George Couper Gibbs, individually, and as Attorney General of the State of Florida, has adopted the action of his predecessor in office, the said Cary D. Landis, in threatening to enforce said State Statute, alleged to be in violation of the Constitution of the United States. In order to protect the constitutional rights of the complainants from invasion by said George Couper Gibbs, it is necessary that they file a supplemental bill of complaint, adding said George Couper Gibbs as a party defendant to this suit, with allegations concerning his actions with reference to said State Statute, and seeking the same relief against him as was sought in the original bill of complaint against said Cary D. Landis and the other defendants, and seeking the issuance of a supplemental subpoena, directed to said George Couper Gibbs; that by reason of the foregoing facts there is a substantial need for continuing and maintaining this suit against said George Couper Gibbs, individually and as Attorney General of the State of Florida, and against the defendant States Attorneys.

Wherefore, the complainants move the Court for the entry of an order granting leave and consent to them to file herein a supplemental bill of complaint in the form and for the purpose above alleged, and to serve the same.

(Sgd.) WIDEMAN, WARDLAW & CALDWELL,  
*Solicitors for Complainants.*

MANLEY P. CALDWELL,  
*Of Counsel.*

**EXHIBIT D.**

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.

Equity. No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
Complainants,

*v.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, Defendants.

SPECIAL APPEARANCE AND OBJECTIONS OF GEORGE COUPER  
GIBBS TO BEING MADE PARTY DEFENDANT TO SAID CAUSE.

George Couper Gibbs, appearing specially and solely for  
the purpose of presenting these objections, hereby objects  
to each and every of the following proceedings proposed on  
the part of the plaintiffs in this cause:

1. To the granting of their motion for leave to file supplemental bill of complaint naming him as a party defendant to said cause.
2. To the issuance of subpoena against him under said proposed supplemental bill.
3. To the granting of the proposed temporary or permanent injunction against him.

For grounds of this motion, the objector shows the following:

A. The original bill of complaint having been removed by appeal to the U. S. Supreme Court, this Court is without power to allow the same to be supplemented.

B. The original bill of complaint in this cause was brought against the late Cary D. Landis, deceased, as principal and primary defendant; and, the cause of action, if



any, stated in the original bill of complaint has now become moot by reason of the death of the aforesaid Cary D. Landis.

C. Said suit is now abated leaving no predicate whereon can be founded the right to file a supplemental bill.

D. It has not been shown that there is a substantial need for continuing or maintaining said suit in view of the death of the said Cary D. Landis.

E. No proper or sufficient showing is made that this objector adopts or continues, or threatens to adopt or continue the alleged action of his predecessor in enforcing the Florida statute complained of.

F. The allegations of the proposed supplemental bill and its supporting affidavit with respect to the alleged actions and conduct of this objector in regard to the enforcement of the said State statute are vague and lacking in specification as to the time, place, and manner in which it is claimed this objector is threatening to enforce the said State statute; and said allegations are shown to be groundless and untrue in fact by the affidavit of the objector hereto attached marked Exhibit "A", made part hereof.

G. The method provided by U. S. Code, Title 28, Sec. 780, is exclusive, and has not been followed in that the proposed supplemental bill does not seek to substitute this objector as a party defendant in the place of said Cary D. Landis, deceased.

H. Even if the instant motions of the plaintiffs were construed as a motion to substitute the objector as a defendant in place of said Cary D. Landis, deceased, such motion could be properly lodged only in the Supreme Court of the United States, in which Court the appeal of said Landis was pending at the time of his death.

I. The sole method provided for the proposed bringing in of the objector as a party defendant to this suit is afforded by U. S. Code Title 28, Sec. 780; insofar as said statute attempts to provide for a substitution of the objector for his predecessor in office in this cause brought to restrain the enforcement of a state statute, said federal

statute operates to cut off the right of the objector to defend his cause and to bind him by the pleadings and proceedings theretofore taken by his predecessor, not in privacy with him, and is therefore in contravention of the Fifth Amendment to the Constitution of the United States, in depriving the objector of his property without due process of law; and in depriving him of his day in Court.

(Signed)

GEORGE COUPER GIBBS,  
*In Propria Persona.*

STATE OF FLORIDA,  
County of Leon, ss:

Affidavit of George Couper Gibbs in Support of Objections.

Before me personally appeared George Couper Gibbs who being first duly sworn, says:

I make this affidavit in support of the objections filed by me to being made party defendant in the above entitled cause, and in so doing I appear specially and solely for the purpose of supporting the said objections.

I am familiar with the proposed supplemental bill of complaint tendered by the plaintiffs in this cause, and it is true as therein alleged that I am the Attorney General of the State of Florida, and that I succeeded in such office the late Cary D. Landis, deceased, formerly a defendant in said cause.

I am without knowledge whether it is true as alleged in the original bill of complaint that the said Cary D. Landis was threatening or ever threatened to enforce the said State statute either against these complainants or others similarly situated, whether by enforcing the penal or confiscatory provisions of said statute or otherwise; although, based upon an investigation of the affairs of the office of my said predecessor, I am informed and believe that all such allegations are unfounded and untrue. However this may be, I assert most positively and without qualification that I have never threatened to enforce said State statute or any provision thereof at any time, either against the plaintiffs in said suit or any other persons whomsoever, either upon the contingencies referred to in said supple-

mental bill or otherwise; nor am I now making such threats or any of them; nor have I directed or authorized any of the parties defendant to said cause to take or to threaten to take any such action against any person, firm, association, or corporation whomsoever.

No proceeding is now pending in any court looking to the enforcement of said statute under any direction or authority from me; and without such direction or authority no such proceeding may be brought.

(Signed)

GEORGE COUPER GIBBS.

Sworn to and subscribed before me this 9th day of July.

EVELYN DAVIS,

[SEAL.]

*Notary Public,*

*State of Florida at Large.*

My Commission Expires Mar. 7, 1939.

### EXHIBIT E.

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.

Equity. No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
Complainants,

*v.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, Defendants.

OBJECTIONS OF DEFENDANT STATE'S ATTORNEYS TO THE PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BILL.

The defendant State's Attorneys, without waiving or impairing in any manner the motion to dismiss this suit heretofore filed by them or the position asserted by them that this suit is now abated by reason of the death of former

defendant, Cary D. Landis, and incapable of revival, object to the granting of plaintiffs' motion for leave to file supplemental bill upon the following grounds:

1. Said suit is now abated, leaving no predicate whereon can be founded the right to file a supplemental bill.

2. By reason of the matters set forth in the suggestion of death and motion to dismiss said suit for want of necessary parties heretofore filed by these defendants, no suit is now pending in this Court.

3. A supplemental bill is not a proper or permissible method of bringing in as party defendant the successor in office to the deceased defendant Cary D. Landis.

4. Even if said suit were subject to revival as against the successor in office of said Cary D. Landis, deceased, the method provided by U. S. Code Title 28, Sec. 780 is exclusive, and has not been followed.

5. Even if said suit were subject to revival as against the successor in office of said Cary D. Landis, deceased, the original bill of complaint is now removed by appeal to the United States Supreme Court, and this Court is without power to allow the same to be supplemented.

TYRUS A. NORWOOD,  
*Assistant Attorney General;*  
ANDREW BENNETT,  
LUCIEN H. BOGGS,  
*Solicitors for Defendant*  
*State's Attorneys.*

**EXHIBIT F.**

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.

Equity. No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
Complainants.

*vs.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, Defendants.

This cause came on for hearing in Pensacola, Florida, on  
July 11th, 1938, before Honorable Rufus E. Foster, Circuit  
Judge, Honorable Louie W. Strum and Honorable A. V.  
Long, District Judges, upon motion of the defendants State  
Attorneys of the State of Florida to dismiss the cause, and  
upon motion of the plaintiffs to file supplemental bill, which  
motions were argued by counsel for the respective parties.

It is the opinion of the Court that the State Attorneys  
filing the motion to dismiss the cause are necessary parties  
defendant to the suit and, therefore, the cause did not abate  
as to them upon the death of said Honorable Cary D. Landis.  
Said motion to dismiss is denied.

It is also the opinion of the Court that the supplemental  
bill, for which leave to file is asked, in effect substitutes Hon-  
orable George Couper Gibbs as a party defendant in the  
place of Honorable Cary D. Landis, deceased. On authority  
of *ex parte* La Prade, 289 U. S. 444, said motion is denied.

(Sgd.)

RUFUS E. FOSTER,

*United States Circuit Judge,*

(Sgd.)

LOUIE W. STRUM,

*United States District Judge,*

(Sgd.)

A. V. LONG,

*United States District Judge.*



IN THE UNITED STATES DISTRICT COURT IN AND FOR THE  
NORTHERN DISTRICT OF FLORIDA.

I, William Logan Hill, Clerk of the above styled Court,  
do hereby certify that the foregoing:

Suggestion of Death, filed May 10, 1938;

Motion to Dismiss Suit, filed May 10, 1938;

Motion for Leave to File Supplemental Bill, filed July 11,  
1938;

Special Appearance and Objections of George Couper  
Gibbs to being made Party Defendant to said Cause, filed  
July 11, 1938;

Objections of Defendant State's Attorneys to the Plain-  
tiffs' Motion for Leave to File Supplemental Bill, filed July  
11, 1938;

Order of the Court, dated July 11, 1938,

are true and correct copies of the respective original plead-  
ings and order hereinabove described, and that the originals  
hereof are on file in said Court.

In Witness Whereof, I have hereunto set my hand and  
Seal of this Court this 8th day of August, 1938.

WILLIAM LOGAN HILL,

[SEAL.]

*Clerk United States District Court  
in and for the Northern District of Florida.*

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**EXHIBIT G.**

Senate Bill No. 679.

AN ACT declaring to be an unlawful monopoly and its pur-  
poses to be in restraint of trade; any combination of per-  
sons, firms or corporations which determine the amount  
of money to be paid to it or to its members for the privi-  
lege of rendering privately or publicly for profit copy-  
righted vocal or instrumental musical compositions, when  
such combination is composed of a substantial number of  
all musical composers, copyright owners, or their heirs,  
successors or assigns; to require each composer and each  
author of vocal or instrumental copyrighted musical com-

positions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and non-enforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's

fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

*Be it Enacted by the Legislature of the State of Florida:*

SECTION 1. It shall be unlawful for authors, composers, publishers; owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio, receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a sepa-

rate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical compositions, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyrighted owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

SECTION 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may

have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

SECTION 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

SECTION 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement, or license, shall be subject to the penalties of this Act.

SECTION 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by



any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

SECTION 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm, or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction; for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal per-

formance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or reproduction apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement, or performance is or are affiliated or under contract in any manner whatsoever with any other person firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty

of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance, or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State

or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

SECTION 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

SECTION 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm, or corporation shall be subject to all the penalties in this Act provided for violations thereof.

SECTION 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

SECTION 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal, or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

SECTION 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

SECTION 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending,



a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

SECTION 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy of copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, and attorney's fees.

SECTION 12. If any section, sub-section, sentence clause or any part of this Act, is for any reason, held or declared to be unconstitutional imperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

SECTION 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

SECTION 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

(7049)



**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**SEP 7 1938**

**SUPREME COURT OF THE UNITED STATES**

CHARLES LEMONE CROPLEY  
CLERK

**OCTOBER TERM, 1938**

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**No. 276**

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**CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL  
OF THE STATE OF FLORIDA, ET AL.,**

*Appellants,*

*vs.*

**GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUB-  
LISHERS, ET AL.**

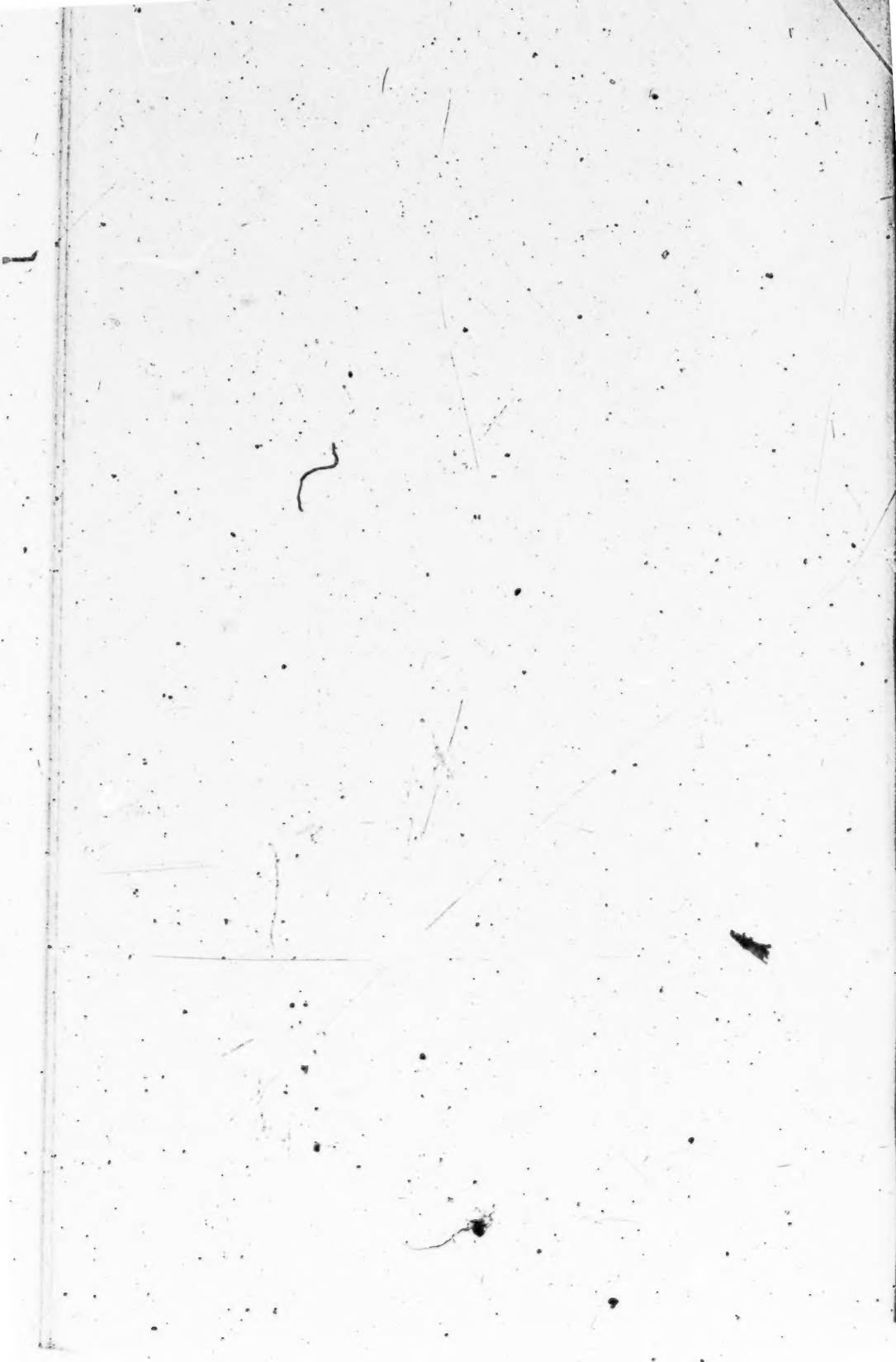
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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF FLORIDA.**

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**ANSWER OF APPELLEES TO MOTION TO VACATE  
DECREE AND DIRECT DISMISSAL OF BILL OF  
COMPLAINT.**

✓ THOMAS G. HAIGHT,  
✓ FRANK J. WIDEMAN,  
✓ LOUIS D. FROHLICH,  
✓ HERMAN FINKELSTEIN,  
✓ MANLEY P. CALDWELL,  
*Counsel for Appellees.*





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### SUBJECT INDEX.

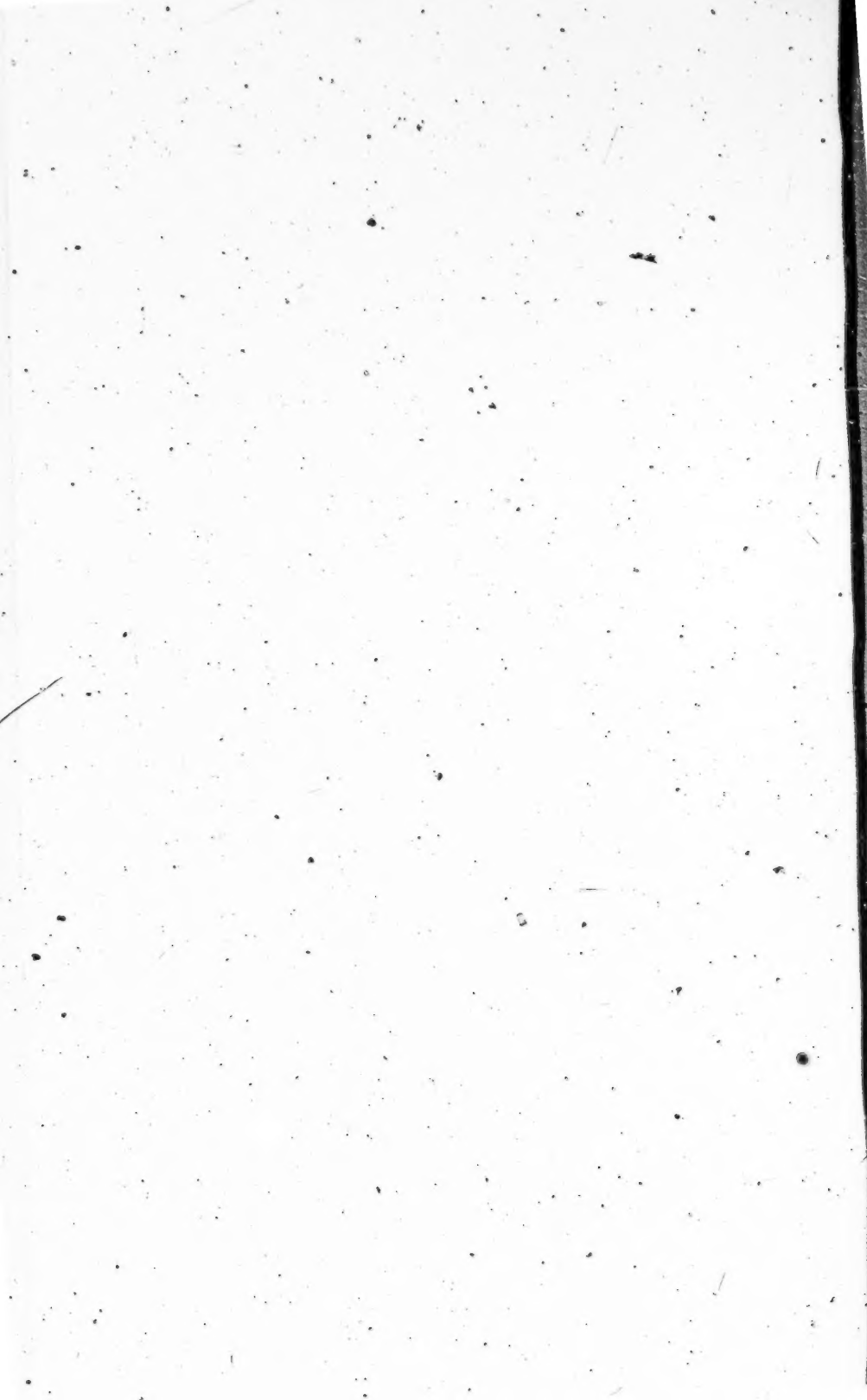
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 276

CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL  
OF THE STATE OF FLORIDA, ET AL.,

*Appellants,*

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUB-  
LISHERS, ET AL.,

*Appellees.*

**ANSWER OF APPELLEES TO MOTION OF APPEL-  
LANT STATE'S ATTORNEYS TO VACATE DECREE  
AND DIRECT DISMISSAL OF BILL OF COMPLAINT.**

Appellees Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa answering the motion of appellant State's Attorneys to vacate the decree of the lower court and direct the District Court for the Northern District of Florida to dismiss the bill of complaint, heretofore filed in this cause for want of the necessary party, respectfully show:

1. Admit the correctness of all the exhibits annexed to appellants' moving papers; but allege that such exhibits are

incomplete and that the hearing mentioned and described in paragraph "4" of the motion was held upon a number of papers material to the consideration of this motion which are not included in, referred to, or annexed to the moving papers herein, and which will be hereinafter set forth and described.

2. After the appellants filed in the District Court the suggestion of death and the motion to dismiss (Exhibits "A" and "B" annexed to the moving papers), appellees on June 27, 1938, served upon George Couper Gibbs, individually and as Attorney General of the State of Florida and upon the attorneys for the appellants, copies of a proposed supplemental bill of complaint, a copy of which is annexed hereto and marked Exhibit "1".

3. Prior to said date, to wit, on June 24, 1938, appellees also caused to be served upon appellants a motion for leave to file such supplemental bill, copy of which is annexed to appellants' moving papers as Exhibit "C" thereof.

4. On June 27, 1938, appellees also caused to be served upon appellants a motion to extend the interlocutory injunction theretofore granted against appellants, including Cary D. Landis, deceased, to include his successor in office George Couper Gibbs, copy of which is annexed hereto as Exhibit "2".

5. A copy of the proof of service of the foregoing papers (Exhibits "1" and "2" hereto annexed, and Exhibit "C" annexed to appellant's moving papers) is annexed hereto as Exhibit "3".

6. On July 2, 1938, appellees caused to be served upon appellants and upon George Couper Gibbs, individually and as Attorney General of the State of Florida and upon Fred P. Cone, as Governor of the State of Florida, a notice, notifying such parties that a hearing would be held on July 11;

1938, on appellees' motion for leave to file a supplemental bill of complaint in the form annexed to said notice, copy of which supplemental bill had theretofore been served on the attorneys for appellants, and that at such hearing appellees would move for an order extending the temporary injunction theretofore entered against the appellants to include and restrain George Couper Gibbs, individually and as Attorney General of the State of Florida, in place of and to the same extent as his predecessor in office Cary D. Landis was enjoined by the interlocutory injunction order entered on April 5, 1938. A copy of such notice is annexed hereto as Exhibit "4".

7. On July 11, 1938, the appellants other than Cary D. Landis again served upon appellees their objections to the plaintiffs' motion for leave to file supplemental bill they had previously served on June 27, 1938. A copy of such objections is annexed to the appellants' moving papers as Exhibit "E".

8. At the same time, to wit, July 11, 1938, George Couper Gibbs served upon counsel for appellees his special appearance and objections to being made a party defendant to the cause, together with the copy of his affidavit verified July 9, 1937, copy of which is annexed to appellants' moving papers as Exhibit "D".

9. After hearing the parties on all the papers aforesaid, the United States District Court for the Northern District of Florida, consisting of Honorable Rufus E. Foster, United States Circuit Judge, Honorable Louie W. Strum, United States District Judge and Honorable A. V. Long, United States District Judge, made and entered an order on July 11, 1938 denying the appellant State's Attorneys' motion to dismiss, on the ground that they "are necessary parties defendant to the suit and, therefore, the cause did not abate as to them upon the death of said Honorable Cary



D. Landis"; and also denying appellees' motion for leave to file supplemental bill substituting George Couper Gibbs in place of Cary D. Landis, the court stating:

"the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *ex parte* LaPrade, 289 U. S. 444, said motion is denied."

A copy of this order is annexed to appellants' moving papers as Exhibit "F".

10. Appellees deny each and every allegation contained in paragraph "5" of appellants' motion, and allege that the State's Attorneys are necessary parties to this suit, inasmuch as the State Statute (Chapter 17807, Laws of Florida, 1937—Exhibit "G" annexed to appellants' motion) actually requires the State's Attorneys to enforce the Statute, although it imposes a further requirement that they do so under the direction of the Attorney General. This appears from both the title of the Statute (moving papers, p. 17) and Section 9 (moving papers, p. 25), as well as Section 10-B (moving papers, p. 25).

11. The provision that the State's Attorneys shall act under the direction of the Attorney General was merely surplusage in this Statute, inasmuch as the laws of the State of Florida require the State's Attorneys in all cases to act under the direction of the Attorney General. Section 131, Compiled General Laws of Florida, provides:

"131. (107). *To have superintendence and direction of State attorneys.*—The Attorney-General shall exercise a general superintendence and direction over the several State attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the State attorneys, shall give them his opinion upon any question of law. (Ch. 2098, Feb. 27, 1817, § 1.)"

12. Notwithstanding Section 131 quoted above, it is common knowledge that the several State's Attorneys of the State of Florida do not await the specific direction of the Attorney General in enforcing the statutes of the State of Florida, and that the purpose of Section 131 of the Compiled General Laws and of Section 9 of the State Statute is to compel the State's Attorneys to obey the instructions of the Attorney General when such specific instructions are given. In the absence of specific instructions, each of the State's Attorneys proceeds on the theory that it is his duty to enforce the law in the first instance, as required by Section 4739 of the Compiled General Laws of Florida, describing the general duties of the State Attorney as follows:

"4739. (3005). *Before the court itself.*—It shall be his duty to appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the State all suits, applications or motions, civil or criminal, in which the State is a party. (Ch. 1661, Aug. 6, 1868, § 3.)"

13. The appellant State's Attorneys are clearly necessary parties to this suit, since the State Statute does not empower the Attorney General to bring any proceeding thereunder, and vests in the Attorney General only the power to direct the State's Attorneys to enforce the Statute, but primarily vests the duty of enforcement upon the appellant State's Attorneys themselves.

14. If appellant's motion should be granted, appellees will be compelled to refrain from continuing their business in the State of Florida because the fines, imprisonment, penalties and forfeitures which appellees will suffer if they violate the State Statute are so enormous and severe that appellees cannot risk violation of the Statute, pending resort to the courts to test its validity.

15. The late Attorney General of the State of Florida, Cary D. Landis, one of the defendants below, then acting

through his assistant Attorney General, Tyrus A. Norwood, on March 7, 1938, wrote to the three-judge court below that "if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute it under the provisions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts". A copy of that letter is annexed hereto as Exhibit "5".

16. Said Tyrus A. Norwood has continued to act in the same capacity on behalf and as representative of the present Attorney General of the State of Florida, George Couper Gibbs, as he did on behalf and as representative of the late Cary D. Landis; and said Tyrus A. Norwood, in his capacity as Assistant to Attorney General George Couper Gibbs, and on information and belief acting under instructions from him, has continued to appear in this action, and now appears on behalf of the appellant State's Attorneys.

17. Said George Couper Gibbs, directly and through his representative and assistant Tyrus A. Norwood, proposes to continue the same course of conduct in the enforcement of this State Statute that was adopted by his predecessor in office, Cary D. Landis, as appears from his affidavit of July 9th in opposition to appellees' motion to make him a party to this cause, wherein he states: "based upon an investigation of the affairs of the office of my said predecessor, I am informed and believe that all such allegations [that Cary D. Landis threatened to enforce the State Statute] are unfounded and untrue" (Exhibit "D" annexed to appellants' motion papers, p. 12).

18. Upon information and belief, George Couper Gibbs was familiar with the letter of his predecessor, Exhibit

"5" hereto annexed, when that statement was made, and proposes likewise to direct said attorneys to prosecute complainants if the pending interlocutory injunction against them is vacated.

19. The said George Couper Gibbs also stated in said affidavit, Exhibit "D", that "I have never threatened to enforce said State statute or any provision thereof at any time, either against the plaintiffs in said suit or any other persons whomsoever, either upon the contingencies referred to in said supplemental bill or otherwise; nor am I now making such threats or any of them; nor have I directed or authorized any of the parties defendant to said cause to take or to threaten to take any such action against any person, firm, association, or corporation whomsoever" (pp. 12-13). The said George Couper Gibbs did not, however, deny his intention to prosecute complainants under the State Statute if the pending temporary injunction should be vacated. On information and belief he proposes to so prosecute complainants if such temporary injunction should be vacated by the dismissal of this suit, as prayed for by his assistant, said Tyrus A. Norwood. The said George Couper Gibbs makes no suggestion that he believes the State Statute to be unconstitutional, nor does he say that he will not enforce the Statute.

20. Appellees are renewing in this Court and are filing their motion to substitute George Couper Gibbs, individually and as Attorney General of the State of Florida in the place and stead of Cary D. Landis, deceased, on the ground that he has adopted and continues and threatens to adopt and continue the action of his predecessor in enforcing the State Statute, which is in violation of the Constitution of the United States, and that there is a substantial need for

continuing and maintaining this suit against said George Couper Gibbs and against the defendant State's Attorneys.

*Allen v. Regents of University*, 58 Sup. Ct. 980; 28

U. S. C. A. § 780; Rule 25, subd. (d) of new Rules of Civil Procedure.

21. The motion of appellant State's Attorneys to vacate the decree of the United States District Court for the Northern District of Florida, and to direct that court to dismiss the bill of complaint heretofore filed in this Court for want of the necessary party should be denied.

THOMAS G. HAIGHT,

FRANK J. WIDEMAN,

LOUIS D. FROHLICH,

HERMAN FINKELSTEIN,

MANLEY P. CALDWELL,

*Counsel for Appellees.*



**EXHIBIT "1".**

UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF FLORIDA, GAINESVILLE DIVI-  
SION.

Equity No. 12.

GENE BUCK, Individually and as President of the Ameri-  
can Society of Composers, Authors and Publishers; CARL  
FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC.,  
DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE  
PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,  
*Complainants,*

*against*

GEORGE COUPER GIBBS, Individually and as Attorney Gen-  
eral of the State of Florida; E. DIXIE BEGGS, JR., Individ-  
ually and as State Attorney for the First Judicial Cir-  
cuit of Florida; O. C. PARKER, JR., Individually, and as  
State Attorney for the Second Judicial Circuit of Flo-  
rida; A. K. BLACK, Individually, and as State Attorney  
for the Third Judicial Circuit of Florida; WILLIAM A.  
HALLOWES, III, Individually and as State Attorney for the  
Fourth Judicial Circuit of Florida; J. W. HUNTER, Indi-  
vidually and as State Attorney for the Fifth Judicial Cir-  
cuit of Florida; CHESTER B. McMULLEN, Individually and  
as State Attorney for the Sixth Judicial Circuit of Flo-  
rida; MURRAY SAMS, Individually and as State Attorney  
for the Seventh Judicial Circuit of Florida; J. C. ADKINS,  
Individually and as State Attorney for the Eighth Judi-  
cial Circuit of Florida; MURRAY W. OVERSTREET, Individ-  
ually and as State Attorney for the Ninth Judicial Cir-  
cuit of Florida; L. GRADY BURTON, Individually and as  
State Attorney for the Tenth Judicial Circuit of Florida;  
G. A. WORLEY, Individually and as State Attorney for the  
Eleventh Judicial Circuit of Florida; ROY D. STUBBS, In-  
dividually and as State Attorney for the Twelfth Judicial  
Circuit of Florida; J. REX FARRIOR, Individually and as  
State Attorney for the Thirteenth Judicial Circuit of Flo-

rida; JOHN H. CARTER, JR., Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; LOUIS F. MAIRE, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "JOHN DOE" and "RICHARD ROE", *Defendants*.

### **Supplemental Bill of Complaint.**

The complainants, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, by their undersigned counsel, bring this their supplemental bill of complaint herein, by leave of Court first had and obtained, against George Couper Gibbs, individually and as Attorney General of the State of Florida, and the other defendants named in the caption hereinabove, and say:

1. Since the filing of the original bill of complaint herein, certain material facts have occurred, as are hereinafter alleged.

2. On the 3rd day of March, 1938, this cause came on for hearing before a Statutory Three Judge Court, upon the application of the complainants for an interlocutory injunction, and the motion of the defendants to dismiss the bill of complaint. On the 5th day of April, 1938, the Court entered an order granting the application for an interlocutory injunction, enjoining the defendants from enforcing said statute, and denying the motion of the defendants to dismiss the bill of complaint.

3. On the 25th day of April, 1938, the defendants petitioned for the allowance of an appeal from said order of April 5th, 1938, to the Supreme Court of the United States, which said appeal was allowed, and is now pending.

4. Thereafter, on the 10th day of May, 1938, the defendant, Cary D. Landis, who was named a party defendant in said action, individually and as Attorney General of the State of Florida, departed this life, and on the 16th day of May, 1938, George Couper Gibbs became, and is now, the

duly appointed, qualified and acting Attorney General of the State of Florida. Said George Couper Gibbs is a citizen and resident of the State of Florida.

5. Said George Couper Gibbs, individually and as Attorney General of the State of Florida, has adopted and continues the action of his predecessor, Cary D. Landis; as alleged in the original bill of complaint herein, in enforcing the State Statute described in the said bill of complaint, Senate Bill No. 679 of the Acts of Florida for 1937, and is required by said State Statute to enforce the same, and said George Couper Gibbs is threatening to proceed to enforce said State Statute; that said George Couper Gibbs, individually and as an official charged with the duties of enforcing said State Statute, has threatened to, and will, enforce said State Statute in each and all of its terms, and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refused to accept or submit to a system of compulsory licensing; and said George Couper Gibbs has threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and re-performed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take

any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail or refuse to submit to the jurisdiction of the State Courts of Florida; and said George Couper Gibbs has threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

Therefore, the complainants pray:

1. That a supplemental writ of subpoena may issue to the said George Couper Gibbs, individually and as Attorney General of the State of Florida, made a party defendant hereto, requiring him to answer the bill of complaint and this supplemental bill of complaint, fully and truthfully, but not on oath, an oath being hereby waived.

2. That said George Couper Gibbs, individually and as Attorney General of the State of Florida, be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Fed-

eral Courts of the State of Florida or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the above named defendants, and each of them, requiring them to show cause why a temporary injunction against said George Couper Gibbs, individually and as Attorney General of the State of Florida, should not issue as prayed for herein.

3. That said State Statute, and each and every part and section thereof, be declared, as to said George Couper Gibbs, individually and as Attorney General of the State of Florida, to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute, and each and every part and section thereof, by said George Couper Gibbs, individually and as Attorney General of the State of Florida, as hereinabove prayed for.

4. That further and general relief be granted as the nature of the complainants' case may require, or to equity may seem just and proper.

WIDEMAN, WARLOW & CALDWELL,  
*Solicitors for Complainants.*

FRANK J. WIDEMAN,  
*Of Counsel.*

MANLEY P. CALDWELL,  
*Of Counsel.*

STATE OF NEW YORK;  
*County of New York, ss:*

Gene Buck, being duly sworn, deposes and says:

That he is one of the complainants in the above entitled action;

That he has read the foregoing Supplemental Bill of Complaint, and knows the contents thereof, and is fully familiar with the facts stated therein; that the same is true to his own knowledge, except as to the matters therein stated to be



alleged upon information and belief, and that as to those matters he believes them to be true.

GENE BUCK.

Subscribed and sworn to before me this 20th day of June, 1938.

BELLE G. BALATOW,  
Notary Public, State of New York.

Queens Co. Clk's No. 66, Reg. No. 14.  
N. Y. Co. Clk's No. 132, Reg. No. 0B117.  
Kings Co. Clk's No. 222, Reg. No. 310.  
Bronx Co. Clk's No. 31, Reg. No. 113B40.  
My commission expires — — —,

### EXHIBIT "2".

UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF FLORIDA, GAINESVILLE DIVI-  
SION.

EQUITY No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers; CARL  
FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC.,  
DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE  
PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,  
*Complainants,*

*against*

GEORGE COUPER GIBBS, Individually and as Attorney General  
of the State of Florida; E. DIXIE BEGGS, JR., Individually  
and as State Attorney for the First Judicial Circuit of  
Florida; O. C. PARKER, JR., Individually and as State At-  
torney for the Second Judicial Circuit of Florida; A. K.  
BLACK, Individually, and as State Attorney for the Third  
Judicial Circuit of Florida; WILLIAM A. HALLOWES, III,  
Individually, and as State Attorney for the Fourth Judi-  
cial Circuit of Florida; J. W. HUNTER, Individually and as  
State Attorney for the Fifth Judicial Circuit of Florida;  
CHESTER B. McMULLEN, Individually and as State Attor-

ney for the Sixth Judicial Circuit of Florida; MURRAY SAMS, Individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. ADKINS, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; MURRAY W. OVERSTREET, Individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. GRADY BURTON, Individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. WORLEY, Individually and as State Attorney for the Eleventh Judicial Circuit of Florida; ROY D. STUBBS, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. REX FABRIOR, Individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; JOHN H. CARTER, JR., Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; LOUIS F. MAIRE, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "JOHN DOE" and "RICHARD ROE", *Defendants*.

**Motion for Extension of Temporary Injunction to Include  
George Couper Gibbs.**

Now come the complainants in the above entitled cause, by their undersigned counsel, and move the Court for an order enjoining the defendant George Couper Gibbs, individually and as Attorney General of the State of Florida, as hereinafter prayed for, and for other and further relief in the above entitled cause, and say:

1. On the 7th day of February, 1938, complainants filed their bill of complaint, and motion for interlocutory injunction and affidavits in support thereof in this Court against defendants Cary D. Landis, individually and as Attorney General of the State of Florida and the various States Attorneys for the respective judicial circuits in the State of Florida for an injunction, interlocutory and permanent, enjoining the defendants from enforcing Senate Bill 679 of the Acts of Florida for 1937, and for the purpose of having said Statute declared unconstitutional, null and void.

2. Thereafter, on the 3rd day of March, 1938 this cause came on for hearing before a Statutory three Judge Court,

upon the application of the complainants for an interlocutory injunction, and the motion of the defendants to dismiss the bill of complaint. On the 5th day of April, 1938, the Court entered an order granting the application for an interlocutory injunction enjoining the defendants from enforcing said Statute and denying the motion of the defendants to dismiss the bill of complaint.

3. On the 25th day of April, 1938, the defendants petitioned for the allowance of an appeal from said order of April 5, 1938, to the Supreme Court of the United States, which said appeal was allowed and is now pending.

4. Thereafter, on the 10th day of May, 1938, the defendant Cary D. Landis, who was named a party defendant in said action, individually and as Attorney General of the State of Florida departed this life, and on the 16th day of May, 1938 George Couper Gibbs became and is now the duly appointed, qualified and acting Attorney General of the State of Florida.

5. Said George Couper Gibbs, individually and as Attorney General of the State of Florida has adopted the action of his predecessor in office, the said Cary D. Landis, in threatening to enforce said Statute, alleged to be in violation of the Constitution of the United States. In order to protect the Constitutional rights of the complainants from an invasion by said George Couper Gibbs, it became necessary that complainants file a supplemental bill of complaint, duly verified June 20, 1938, adding said George Couper Gibbs as a party defendant to this suit with allegations concerning his actions with reference to said State Statute, and seeking the same relief against him as was sought in the original bill of complaint against said Cary D. Landis and the other defendants, and seeking the issuance of a supplemental subpoena directed to said George Couper Gibbs; that by reason of the foregoing facts and by reason of the facts in the supplemental bill of complaint herein, which are repeated with the same force and effect as if herein set forth in full, there is a substantial need for continuing and maintaining the interlocutory injunction heretofore entered herein against said George Couper Gibbs, individually and

as Attorney General of the State of Florida, and to bind him by said interlocutory injunction to the same extent as his predecessor, Cary D. Landis was bound thereby, and to continue said interlocutory injunction against the defendants States Attorneys.

WHEREFORE, the complainants move the Court for the entry of an order granting an interlocutory injunction *pendente lite* restraining the defendant George Couper Gibbs, individually and as Attorney General of the State of Florida from proceeding against the complainants, and others similarly situated, their officers, employees or agents by criminal prosecution, and restraining said defendant from requiring the complainants and others similarly situated to affix to copies of their copyrighted musical compositions a fixed price for all uses of their respective works, and from interfering with all existing contracts entered into between complainants and others, including citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said State Statute, in the event such citizens and residents desire to carry out their contracts with complainants, and from taking any steps instituting any actions or proceedings or doing anything for the purpose of enforcing said State Statute; and for an order continuing the interlocutory injunction heretofore entered herein as against the defendants E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida, O. C. Parker, Jr., individually and as State Attorney for the Second Judicial Circuit of Florida, A. K. Black, individually, and as State Attorney for the Third Judicial Circuit of Florida, William A. Hallows, III, individually and as State Attorney for the Fourth Judicial Circuit of Florida, J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida, Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida, J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida, Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Cir-

cuit of Florida, L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida, G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida, Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida, J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida, John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida, Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida, individually and as respective States Attorneys, and extending such interlocutory injunction to include, be applicable to and to restrain the defendant George Couper Gibbs, individually and as Attorney General of the State of Florida, to the same extent as the late Cary D. Landis, individually and as Attorney General of the State of Florida was enjoined by said interlocutory injunction.

WIDEMAN, WARDLAW & CALDWELL,

*Solicitors for Complainants.*

MANLEY P. CALDWELL,

*Of Counsel.*

### EXHIBIT "3".

IN THE UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT OF FLORIDA, GAINES-  
VILLE DIVISION.

EQUITY No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
*Complainants,*

*v.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, *Defendants.*

### Proof of Service.

STATE OF FLORIDA,

*County of Palm Beach, ss:*

This day personally appeared before me, a notary public duly authorized to administer oaths, Manley P. Caldwell,



who being first duly sworn, deposes and says that he is a member of the firm of Wideman, Wardlaw & Caldwell, solicitors for the complainants in the above styled cause, and is an attorney for said complainants; that on the 24th day of June, 1938, he deposited in the United States mail, in an envelope securely sealed, and with sufficient postage thereunto attached, three (3) true copies of complainants' motion for leave to file supplemental bill, which said motion was filed herein on July 11, 1938, said envelope being addressed to Hon. Tyrus A. Norwood, Assistant Attorney General, Tallahassee, Florida; that on June 27, 1938, he served true copies of supplemental bill of complaint, and motion for extension of temporary injunction, upon Hon. George Couper Gibbs, Attorney General of the State of Florida; Hon. Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Esq., and Andrew W. Bennett, Esq., the three last named being attorneys for the defendants herein, by delivering, in person, at Gainesville, Florida, true copies of said supplemental bill of complaint and motion for extension of temporary injunction, to said Tyrus A. Norwood, the Assistant of said George Couper Gibbs, Attorney General, and to said Lucien H. Boggs. True copies of said supplemental bill of complaint and motion for extension of temporary injunction as so delivered and served, are hereto attached and made a part of this affidavit; that said Tyrus A. Norwood and Lucien H. Boggs did then and there receipt, for themselves and said Andrew W. Bennett, for copies of said supplemental bill of complaint, motion for leave to file supplemental bill of complaint, and motion for extension of temporary injunction, as appears from acknowledgment of service filed herein on July 11, 1938.

MANLEY P. CALDWELL.

Subscribed and sworn to before me this 2nd day of September, 1938.

F. D. MORRISH,  
Notary Public, State  
of Florida at Large.

My commission expires March 29, 1941.

**EXHIBIT "4".****UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF FLORIDA, GAINESVILLE DIVI-  
SION.****Equity No. 12.**

**GENE BUCK**, Individually and as President of the Ameri-  
can Society of Composers, Authors and Publishers, *et al.*,  
*Complainants*,

*v.*

**CARY D. LANDIS**, Individually and as Attorney General of  
the State of Florida, *et al.*, *Defendants*.

**Notice of Hearing.**

To Fred P. Cone, as Governor of the State of Florida;  
George Couper Gibbs, individually and as Attorney Gen-  
eral of the State of Florida; E. Dixie Beggs, Jr., individ-  
ually and as State Attorney for the First Judicial Cir-  
cuit of Florida; O. C. Parker, Jr., individually and as  
State Attorney for the Second Judicial Circuit of Flo-  
rida; A. K. Black, individually and as State Attorney for  
the Third Judicial Circuit of Florida; William A. Hal-  
lowes, III, individually and as State Attorney for the  
Fourth Judicial Circuit of Florida; J. W. Hunter, indi-  
vidually and as State Attorney for the Fifth Judicial  
Circuit of Florida; Chester B. McMullen, individually  
and as State Attorney for the Sixth Judicial Circuit of  
Florida; Murray Sams, individually and as State Attor-  
ney for the Seventh Judicial Circuit of Florida; J. C.  
Adkins, individually and as State Attorney for the Eighth  
Judicial Circuit of Florida; Murray W. Overstreet, in-  
dividually and as State Attorney for the Ninth Judicial  
Circuit of Florida; L. Grady Burton, individually and as  
State Attorney for the Tenth Judicial Circuit of Florida;  
G. A. Worley, individually and as State Attorney for the  
Eleventh Judicial Circuit of Florida; Roy D. Stubbs, in-  
dividually and as State Attorney for the Twelfth Judicial  
Circuit of Florida; J. Rex Farrior, individually and as  
State Attorney for the Thirteenth Judicial Circuit of

Florida; John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louie F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "John Doe" and "Richard Roe":

You, and each of you, are hereby notified that the complainants in the above entitled cause will, on the 11th day of July, 1938, at 10:00 o'clock A. M., in the Courtroom in the Federal Building, at Pensacola, Florida, move Hon. Rufus E. Foster, United States Circuit Judge for the Fifth Circuit, Hon. A. V. Long, United States District Judge for the Northern District of Florida, and Hon. Louie W. Strum, United States District Judge for the Southern District of Florida, constituting a Special Statutory Court, under the provisions of Section 380, Title 28, of the United States Code, Annotated, as amended, for leave to file a supplemental bill of complaint in the above styled cause, in the form and for the purposes alleged in motion for leave to file supplemental bill of complaint, copy of which was delivered, on June 27, 1938, to Tyrus A. Norwood, Esq., Assistant Attorney General of the State of Florida, Lucien H. Boggs, Esq., and Andrew W. Bennett, Esq., solicitors and of counsel for the defendant State Attorneys in the above styled cause.

You, and each of you, are further notified that in the event said Court shall grant said motion, the complainants will, instantler, file their supplemental bill of complaint herein, supported by the affidavit of Gene Buck, annexed thereto, which said supplemental bill of complaint prays for a temporary and permanent injunction, restraining George Couper Gibbs, individually and as Attorney General of the State of Florida, from Bringing directly, or indirectly, or permitting to be brought directly, or indirectly, any proceeding at law or in equity for the purpose of enforcing Senate Bill No. 679 of the State of Florida, enacted by the Legislature of the State of Florida, in its Regular Session held in the year 1937, approved by the Governor of the State of Florida, on June 9, 1937, and filed in the office of the Secretary of State of the State of Florida, on June 10, 1937, relating to the use of copyrighted songs

and music, against the complainants, or any of them, or against others similarly situated. A copy of said proposed supplemental bill of complaint was delivered on June 27, 1938, to Tyrus A. Norwood, Esq., Assistant Attorney General of the State of Florida, Lucien H. Boggs, Esq., and Andrew W. Bennett, Esq., solicitors and of counsel for the defendant State Attorneys.

You, and each of you, are further notified, that, upon such filing of such supplemental bill of complaint, the complainants will, instanter, and before aforesaid Judges, and at said time and place, move the Court for a temporary injunction in the form of an interlocutory decree, restraining said George Couper Gibbs, as Attorney General of the State of Florida, as prayed in said supplemental bill of complaint, and extending the temporary injunction order heretofore entered in this cause on the 5th day of April, 1938, to be applicable to and to restrain the said George Couper Gibbs, individually and as Attorney General of the State of Florida, to the same extent as the late Cary D. Landis, individually and as Attorney General of the State of Florida, was enjoined by said interlocutory injunction, and continuing aforesaid injunction order of April 5th, 1938, against the other defendants in this cause. A copy of said motion for extension of temporary injunction was delivered, on June 27, 1938, to Tyrus A. Norwood, Esq., Assistant Attorney General of the State of Florida, Lucien H. Boggs, Esq., and Andrew W. Bennett, Esq., solicitors and of counsel for defendant State Attorneys.

You are further notified that the hearing upon complainants' said application for a temporary injunction will be held before the said three Judges at the aforesaid time and place, and that the same will be heard upon the supplemental bill of complaint, the bill of complaint, and the affidavits filed with said bill of complaint, and such other proof as may be submitted at said hearing, in accordance with the determination of the Court.

Dated this 2nd day of July, 1938.

WIDEMAN, WARDLAW & CALDWELL,  
FRANK J. WIDEMAN, Solicitors for Complainants.  
MANLEY P. CALDWELL,  
Of Counsel.

STATE OF FLORIDA,  
County of Palm Beach, ss:

This day personally appeared before me, a notary public duly authorized to administer oaths, Manley P. Caldwell, who being first duly sworn, deposes and says that he is a member of the firm of Wideman, Wardlaw & Caldwell, solicitors for the complainants in the above styled cause, and is an attorney for said complainants; that on the 2nd day of July, 1938, he deposited true copies of the above and foregoing Notice of Hearing in the United States mail, in envelopes securely sealed, and with sufficient postage thereunto attached, addressed to: Hon. Fred P. Cone, Governor of the State of Florida, Tallahassee, Florida; Hon. George Couper Gibbs, Attorney General of the State of Florida, Tallahassee, Florida; Tyrus A. Norwood, Esq., Assistant Attorney General, Tallahassee, Florida; Lucien H. Boggs, Esq., Bisbee Building, Jacksonville, Florida and Andrew W. Bennett, Esq., Attorney at Law, Washington, D. C., said three last named addressees being solicitors of record for the defendants State Attorneys, "John Doe", and "Richard Roe", herein.

MANLEY P. CALDWELL.

Subscribed and sworn to before me this 2nd day of July, 1938.

Z. E. BAMBERGER,  
Notary Public, State  
of Florida at Large.

My commission expires June 17, 1942.

The undersigned respectfully acknowledge receipt of a copy of the above and foregoing Notice this 2nd day of July, 1938.

FRED P. CONE,  
Governor of the State of Florida.  
GEORGE COUPER GIBBS,  
Attorney General of the  
State of Florida.



**EXHIBIT "5".**

STATE OF FLORIDA,  
Office of the Attorney General,  
Tallahassee.

Honorable Rufus E. Foster,  
Judge, United States Circuit  
Court of Appeals,  
New Orleans, Louisiana.

March 7, 1938

Re Gene Buck *et al.* vs. State of Florida *et al.*

DEAR JUDGE FOSTER:

Since returning from New Orleans I have been thinking that a statement I made before you in the argument of the above case to the effect that "if the plaintiffs in this case sued for an infringement of their copyrights in the Federal Courts within the State of Florida, that the Attorney General and State's Attorneys would not prosecute them", was not absolutely clear.

In order to be fair to the Court, I would like to state that what I meant by the above remark was that the Attorney General and the State's Attorneys of this State would not prosecute any of the individual complainants if they brought suit in the Federal Courts of this State against persons residing within the State for infringement of copyrights, but if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute under the provisions of Section 1 of the Act, regardless whether the suit was brought in the State or Federal Courts.

Yours very truly,  
(Signed)

CARY D. LANDIS,  
*Attorney General*

By TYRUS A. NORWOOD,  
*Assistant Attorney General*

TAN-a.

CC: Hon. A. V. Long, Gainesville, Florida. Hon. Louis W. Strum, Jacksonville, Florida. Hon. Frank Wideman, West Palm Beach, Florida.



7. 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 278

CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL  
OF THE STATE OF FLORIDA, ET AL.

*Appellants.*

ONE BUCK, INDIVIDUALLY AND AS MEMBER OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF FLORIDA.

MOTION OF APPELLEES TO SUBSTITUTE AND CONTINUE AGAINST SUCCESSORS IN OFFICE.

THOMAS G. HIGHT,  
FRANK J. WIDEMAN,  
LOUIS D. FROEDICH,  
HERMAN FINKELSTEIN,  
MARLEY P. CALDWELL,  
*Counsel for Appellees.*

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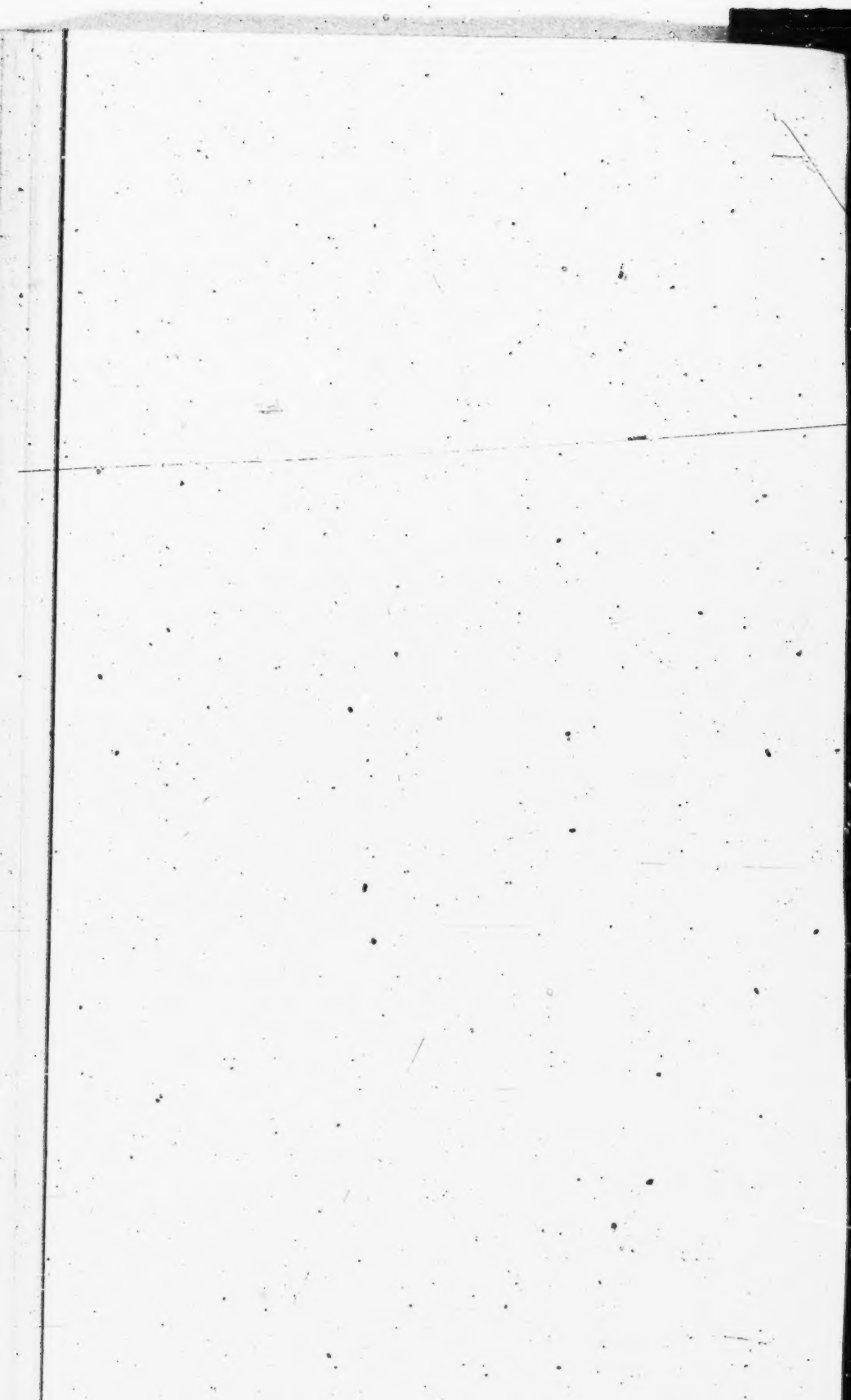
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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 276

CARY D. LANDIS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA; E. DIXIE BEGGS, JR., INDIVIDUALLY AND AS STATE ATTORNEY FOR THE FIRST JUDICIAL CIRCUIT OF FLORIDA; O. C. PARKER, JR., INDIVIDUALLY AND AS STATE ATTORNEY FOR THE SECOND JUDICIAL CIRCUIT OF FLORIDA; A. K. BLACK, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE THIRD JUDICIAL CIRCUIT OF FLORIDA; WILLIAM A. HALLOWES, III, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE FOURTH JUDICIAL CIRCUIT OF FLORIDA; J. W. HUNTER, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE FIFTH JUDICIAL CIRCUIT OF FLORIDA; CHESTER B. McMULLEN, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE SIXTH JUDICIAL CIRCUIT OF FLORIDA; MURRAY SAMS, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA; J. C. ADKINS, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE EIGHTH JUDICIAL CIRCUIT OF FLORIDA; MURRAY W. OVERSTREET, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE NINTH JUDICIAL CIRCUIT OF FLORIDA; L. GRADY BURTON, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA; G. A. WORLEY, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA; ROY D. STUBBS, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA; J. REX FARRIOR, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA; JOHN H. CARTER, JR., INDIVIDUALLY AND AS STATE ATTORNEY FOR THE FOURTEENTH JUDICIAL CIRCUIT OF FLORIDA AND LOUIS F. MAIRE, INDIVIDUALLY AND AS STATE ATTORNEY FOR THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,

*Appellants,*

VS.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT AND JANE SOUSA,

*Appellees.*

## MOTION TO SUBSTITUTE AND CONTINUE AGAINST SUCCESSOR IN OFFICE.

The appellees in the above entitled cause respectfully move this Court for leave to substitute George Couper Gibbs, individually and as Attorney General of the State of

Florida, and to continue this action against the said George Couper Gibbs in the place and stead of Cary D. Landis, deceased, and allege:

1. Appellee American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") is an unincorporated association of more than 1,000 composers, authors and publishers of copyrighted musical compositions. All members of the Society have transferred to it for a period ending December 31, 1940, the exclusive right of public performance for profit of their copyrighted musical compositions. Pursuant to the rights granted to it by its members, the Society has issued to users of music in the State of Florida, licenses to perform publicly for profit the copyrighted musical compositions of its members, the license fees being determined and fixed by agreement between the Society (on behalf of all its members jointly) and the respective users of music.

2. On June 9, 1937, the State of Florida enacted a law regulating in certain cases and prohibiting in other cases, the licensing of copyrighted musical compositions and the bringing of actions for infringement in the Federal Courts (Chapter 17807, Laws of Florida, 1937, General Laws, Volume I, pp. 204-214, inclusive). That Statute will be referred to hereinafter as the "State Statute". A copy of the State Statute is hereto annexed as Exhibit "1".

3. On April 4, 1938, a Statutory District Court for the Northern District of Florida, consisting of Hon. Rufus E. Foster, Circuit Judge, Hon. Louie W. Strum and Hon. A. V. Long, District Judges, made and entered a decree on motion of appellees granting an interlocutory injunction restraining appellants from enforcing said State Statute. The decree was conditioned upon posting a bond, which bond has already been posted, a copy thereof being on file in

this Court. A copy of the said decree granting an interlocutory injunction is hereto annexed as Exhibit "2".

4. On April 25, 1938, the United States District Court for the Northern District of Florida made and entered an order allowing all the above named appellants to appeal to this Court from the said decree granting an interlocutory injunction. A copy of such order is on file in this Court.

5. On August 15, 1938, appellants filed the record and docketed the appeal in this Court.

6. On the same day, to wit, August 15, 1938, the appellant State's Attorneys appeared by Tyrus A. Norwood, Assistant Attorney General of the State of Florida and by Andrew W. Bennett and Lucien H. Boggs, as their attorneys, and filed in this Court a "Suggestion of Death" of the appellant Cary D. Landis, such death having occurred on May 10, 1938. A copy of the "Suggestion of Death" is annexed hereto as Exhibit "3".

7. On the same day, to wit, August 15, 1938, the appellant State's Attorneys moved this Court to vacate the interlocutory injunction entered below and to direct dismissal of the bill of complaint herein on the alleged grounds that this appeal has become moot; that the Attorney General is a necessary party to the action; that the former Attorney General, who was enjoined below, is deceased, and that his successor George Couper Gibbs has not been made a party to this action.

8. On September 7, 1938, appellees filed in this Court their answer to the said motion of appellant State's Attorneys, pointing out the facts hereinafter set forth.

9. George Couper Gibbs was appointed Attorney General of the State of Florida to succeed the said Cary D. Landis, deceased, on May 16, 1938. He is now the duly appointed, qualified and acting Attorney General of that State.

10. On May 31, 1938, appellant State's Attorneys filed in the court below a "Suggestion of Death" of appellant Cary D. Landis, and moved the court below for an order dismissing this suit on the same grounds that have been advanced by said appellants in their motion to dismiss heretofore filed in this Court.

11. On June 24, 1938, appellees served upon appellants and thereafter upon George Couper Gibbs, a motion for leave to file a supplemental bill of complaint substituting said George Couper Gibbs as a party to the action in the place and stead of Cary D. Landis, deceased, pursuant to Section 11, Subdivisions (b) and (c) of the Act of February 13, 1925 (Title 28, U. S. C., Section 78).

12. Both the appellants' motion to dismiss and the appellees' motion to substitute were heard together by the court below on July 11, 1938, whereupon on said date the court below entered an order denying appellant State's Attorneys' motion to dismiss, on the ground that they "are necessary parties defendant to the suit and, therefore, the cause did not abate as to them upon the death of said Honorable Cary D. Landis"; and denied appellees' motion to substitute, on the ground that "the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *ex parte LaPrade*, 289 U. S. 444, said motion is denied". A copy of said order of July 11, 1938 is annexed hereto as Exhibit "4".

13. Section 9 of the State Statute defines the duties of the Attorney General and the State's Attorneys thereunder as follows:

" . . . it shall be the duty of the State's attorneys in their respective circuits, under the direction of the Attorney-General to institute proceedings, civil or criminal, or both, under the terms hereof, against any



combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. \* \* \*

14. The alleged combinations declared unlawful by Section 1 of the Statute include any society of authors, composers or publishers of copyrighted musical compositions constituting a substantial number of persons, firms or corporations within the United States owning or controlling copyrighted musical compositions when one of the objects of the combination is the fixation of license fees for any use of such copyrighted musical compositions for private or public performance for profit. Section 1 makes unlawful any attempted collection of license fees by such alleged combination, makes each attempted collection a separate offense, and subjects all persons involved to the terms and penalties of the Statute.

15. Section 3 of the State Statute declares void and non-enforceable all existing contracts between combinations declared unlawful under Section 1, and it provides that any agent, member or representative of such combination attempting to enforce any existing contract shall be subject to the penalties of the Statute.

16. Section 4-A permits any radio broadcasting station to perform without payment whatsoever any of the musical compositions owned or controlled by any combination declared unlawful by Section 1.

17. Radio broadcasting stations transmitting from without the State of Florida copyrighted musical compositions of members of a combination declared unlawful by Section 1 to broadcasting stations within the State of Florida, are prohibited from collecting license fees on behalf of any such

combination under pain of suffering the penalties of the Statute (Section 4-B).

18. Motion picture and other theatres are authorized to perform publicly for profit the copyrighted musical compositions of any combination declared unlawful by Section 1 without making any payment or receiving any license fee or other exaction therefor (Section 5-A).

19. Theatres within the State of Florida are authorized to use free of charge any copyrighted musical compositions of a combination declared unlawful by Section 1 whenever such compositions are furnished from without the State under contract between such theatres and persons outside the State. Any attempt to collect license fees or other exactions for such use of copyrighted musical compositions is made unlawful (Section 5-B).

20. Where the owner of any theatre or broadcasting station or similar place of amusement publicly performs for profit any copyrighted musical compositions is affiliated with any person, firm or corporation outside the State from whence such copyrighted musical compositions emanate, either by radio, sound production instrumentalities or by furnishing persons to play or sing such music within the State, the responsibility and liability for the use of such copyrighted musical compositions thus emanating from outside the State of Florida is limited to and must rest on such affiliated person, firm or corporation from outside the State who originates the broadcasting or the performance or the sound production instrumentality, or sends the personal singers or performers into the State of Florida. In such case, the owner of the copyrighted composition is prohibited from suing for infringement, loss or damage within the boundaries of the State of Florida for such performance of the copyrighted musical compositions, and such copyright

owner is limited to a recovery against the person, firm or corporation outside the State of Florida (Section 6).

21. Violation of the Statute is made punishable by a fine of not less than \$50 or more than \$5,000, and by imprisonment of not less than one or more than ten years (Section 8). In any prosecution the defendant may be compelled to furnish evidence against itself, and failure to do so subjects defendant to a fine of \$100 for each day of its refusal (Sections 11-A, 11-B). The penalties of the State Statute are cumulative and in addition to the rights and remedies under other statutes of the State of Florida (Section 13). If appellees are a combination in restraint of trade under the Florida Laws, they are subject to *additional* penalties of not less than \$50 or more than \$5,000, and/or imprisonment from one to ten years under Florida Compiled Laws (1927), Article 12, Section 7948. Under that section each day during the continuance of the violation is made a separate offense.

22. The late appellant Cary D. Landis and appellant State's Attorneys threatened to enforce this State Statute and the penalties thereof against appellees if they should violate any of its provisions, and more particularly if appellees should attempt to sue for infringement of their copyrights in any Federal Court in the State of Florida. Such threat was made by a letter dated March 7, 1938, addressed to the three-judge court below written by Tyrus A. Norwood, who is presently acting as Assistant Attorney General on behalf of George Couper Gibbs, and on behalf of the appellant State's Attorneys, and previously acted as Assistant Attorney General for the late Cary D. Landis. In said letter, the said Tyrus A. Norwood wrote "*if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's At-*

*torneys would be compelled to prosecute it under the provisions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts". A copy of that letter is annexed hereto as Exhibit "5".*

23. Said Tyrus A. Norwood has continued to act in the same capacity on behalf and as representative of the present Attorney General of the State of Florida, George Couper Gibbs, as he did on behalf and as representative of the late Cary D. Landis; and said Tyrus A. Norwood, in his capacity as Assistant to Attorney General George Couper Gibbs, and on information and belief acting under instructions from him, has continued to appear in this action, and now appears on behalf of the appellant State's Attorneys. In correspondence relating to this very appeal, said Tyrus A. Norwood has represented himself on many occasions as acting on behalf of George Couper Gibbs. A typical example of such correspondence is annexed hereto as Exhibit "6".

24. Upon information and belief, said George Couper Gibbs, directly and through his representative and assistant Tyrus A. Norwood, has adopted and continues and threatens and proposes to continue the same course of conduct in the enforcement of this State Statute that was adopted by his predecessor in office, Cary D. Landis in enforcing the State Statute against appellees. Upon information and belief, said Tyrus A. Norwood has called to the attention of said George Couper Gibbs the letter of his predecessor, Exhibit "5" hereto annexed, and said George Couper Gibbs proposes likewise to direct appellant State's Attorneys to prosecute appellees if the pending interlocutory injunction against them is vacated.

25. The State Statute imposes the specific duty on the Attorney General and on the State's Attorneys to enforce such Statute, and George Couper Gibbs has never taken

the position that the Statute is unconstitutional or legally unenforceable, but on the contrary, said Tyrus A. Norwood and said Cary D. Landis and said appellant State's Attorneys have taken the position that the Statute is constitutional and would be enforced.

26. There is a substantial need for continuing and maintaining this suit against said George Couper Gibbs, as well as against appellant State's Attorneys.

27. No application for the relief prayed for herein has been made, except the motion in the court below, hereinabove referred to.

28. The death of appellant Cary D. Landis occurred less than six months prior to the date hereof, to wit, on May 10, 1938.

29. Appellees annex hereto their proposed supplemental bill of complaint, bringing the said George Couper Gibbs into this action and substituting him in place of Cary D. Landis, deceased. A copy of said supplemental bill of complaint is annexed hereto as Exhibit "7".

WHEREFORE appellees pray that this Court enter an order herein pursuant to Rule 25, Subdivision (d) of the Rules of Civil Procedure for the District Courts of the United States, and Section 11, Subdivisions (b) and (c) of the Act of February 13, 1925 (Title 28, U. S. C., Section 78), substituting George Couper Gibbs in the place and stead of Cary D. Landis, deceased, and for such other and further relief as to this Court may seem just and proper.

o THOMAS G. HAIGHT,  
FRANK J. WIDEMAN,  
LOUIS D. FROHLICH,  
HERMAN FINKELSTEIN,  
MANLEY P. CALDWELL,

*Counsel for Appellees.*



**EXHIBIT "1".****Senate Bill No. 679.**

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and non-enforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or

sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

*Be it enacted by the Legislature of the State of Florida:*

SECTION 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio, receiving, radio broadcasting and radio re-broadcasting stations, moving picture

houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers, or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical compositions, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instru-

ment player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyrighted owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

SECTION 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation, in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

SECTION 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

SECTION 3: All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such

unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement, or license, shall be subject to the penalties of this Act.

SECTION 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

SECTION 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm, or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination;



or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio sound production or reproduction apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement, or performance is or are affiliated or under contract in any manner whatsoever with any other person firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical com-

positions are privately or publicly rendered for profit, then such person, firm or corporation outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from out-

side this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section; shall be considered, for the purpose of this Act, as intrastate business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

SECTION 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

SECTION 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license

fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm, or corporation shall be subject to all the penalties in this Act provided for violations thereof.

SECTION 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

SECTION 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal, or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

**SECTION 10-A.** Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

**SECTION 10-B.** In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

**SECTION 11-A.** In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

**SECTION 11-B.** If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants



guilty of contempt and shall assess a fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, and attorney's fees.

SECTION 12. If any section, sub-section, sentence clause or any part of this Act, is for any reason, held or declared to be unconstitutional imperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

SECTION 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

SECTION 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

**EXHIBIT "2".**

IN THE UNITED STATE DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.

Equity No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, etc., *et al.*,  
*Complainants*,

*vs.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, *Defendants*.

**Order.**

This cause coming on to be heard and the same having  
been argued by counsel for the respective parties, and the  
Court having inspected the record and the briefs filed;  
It is ordered:

1st. That the application for interlocutory injunction be  
and the same is granted.

2nd. That the defendants, Cary D. Landis, individually  
and as Attorney General for the State of Florida; E. Dixie  
Beggs, Jr., individually and as State Attorney for the First  
Judicial Circuit of Florida; O. C. Parker, Jr., individually  
and as State Attorney for the Second Judicial Circuit of  
Florida; A. K. Black, individually and as State Attorney  
for the Third Judicial Circuit of Florida; William A. Hal-  
lowes, III, individually and as State Attorney for the  
Fourth Judicial Circuit of Florida; J. W. Hunter, individu-  
ally and as State Attorney for the Fifth Judicial Circuit of  
Florida; Chester B. McMullen, individually and as State  
Attorney for the Sixth Judicial Circuit of Florida; Murray  
Sams, individually and as State Attorney for the Seventh  
Judicial Circuit of Florida; J. C. Adkins, individually and  
as State Attorney for the Eighth Judicial Circuit of Flor-  
ida; Murray W. Overstreet, individually and as State At-

torney for the Ninth Judicial Circuit of Florida; L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; and each of them individually and in their respective capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained until the further order of this Court from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court or the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3rd. That the motion made by the defendants to dismiss the bill of complaint be and the same is denied.

4th. That the defendants be given thirty (30) days from the date hereof to answer.

This order is made conditional upon the plaintiffs filing herein within thirty (30) days a bond in the sum of five thou-

said (\$5,000.00) dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order; said bond to be approved by the Clerk of the United States Court for the Northern District of Florida.

Done and ordered this the 4th day of April, A. D. 1938.

(S.)

RUFUS E. FOSTER,  
Circuit Judge.

(S.)

LOUIE W. STRUM,  
District Judge.

(S.)

A. V. LONG,  
District Judge.

### EXHIBIT "3".

#### IN THE SUPREME COURT OF THE UNITED STATES.

CARY D. LANDIS, Individually and as Attorney General of the State of Florida, *et al.*, *Appellants*,

vs.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, *Appellees*.

#### Suggestion of Death of Cary D. Landis.

Come now the appellant State's Attorneys, being the sole surviving appellants, and respectfully suggest to the Court the death of their former co-appellant, co-defendant in the Court below, Cary D. Landis, who departed this life May 10, 1938.

TYRUS A. NORWOOD,  
Assistant Attorney General  
of the State of Florida;

ANDREW W. BENNETT,

LUCIEN H. BOGGS,

Attorneys for appellant State's Attorneys.

## EXHIBIT "4".

IN THE UNITED STATES DISTRICT COURT IN AND  
FOR THE NORTHERN DISTRICT OF FLORIDA,  
GAINESVILLE DIVISION.

Equity No. 12.

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,  
*Complainants,*

*vs.*

CARY D. LANDIS, Individually and as Attorney General of  
the State of Florida, *et al.*, *Defendants.*

This cause came on for hearing in Pensacola, Florida, on July 11th, 1938, before Honorable Rufus E. Foster, Circuit Judge, Honorable Louie W. Strum and Honorable A. V. Long, District Judges, upon motion of the defendants State Attorneys of the State of Florida to dismiss the cause, and upon motion of the plaintiffs to file supplemental bill, which motions were argued by counsel for the respective parties.

It is the opinion of the Court that the State Attorneys filing the motion to dismiss the cause are necessary parties defendant to the suit and, therefore, the cause did not abate as to them upon the death of said Honorable Cary D. Landis. Said motion to dismiss is denied.

It is also the opinion of the Court that the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *ex parte* LaPrade, 289 U. S. 444, said motion is denied.

(Sgd.)

RUFUS E. FOSTER,  
*United States Circuit Judge.*

(Sgd.)

LOUIE W. STRUM,  
*United States District Judge.*

(Sgd.)

A. V. LONG,  
*United States District Judge.*



**EXHIBIT "5".**

STATE OF FLORIDA,  
Office of the Attorney General,  
Tallahassee.

March 7, 1938.

Honorable Rufus E. Foster,  
Judge, United States  
Circuit Court of Appeals,  
New Orleans, Louisiana.

Re Gene Buck *et al.* vs. State of Florida *et al.*

DEAR JUDGE FOSTER:

Since returning from New Orleans I have been thinking that a statement I made before you in the argument of the above case to the effect that "if the plaintiffs in this case sued for an infringement of their copyrights in the Federal Courts within the State of Florida, that the Attorney General and State's Attorneys would not prosecute them", was not absolutely clear.

In order to be fair to the Court, I would like to state that what I meant by the above remark was that the Attorney General and the State's Attorneys of this State would not prosecute any of the individual complainants if they brought suit in the Federal Courts of this State against persons residing within the State for infringement of copyrights, but if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute it under the provisions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts.

Yours very truly,

TAN-a.

(Signed)

Assistant Attorney General.

CARY D. LANDIS,

Attorney General,

By TYRUS A. NORWOOD,

CC: Hon. A. B. Long, Gainesville, Florida.

Hon. Louis W. Strum, Jacksonville, Florida.

Hon. Frank Wideman, West Palm Beach, Florida.

**EXHIBIT "6".**

STATE OF FLORIDA,

Office of the Attorney General,

Tallahassee.

August 12, 1938.

Messrs. Wideman, Wardlaw & Caldwell,  
Attorneys at Law,  
West Palm Beach, Florida.

*Re Buck et al. vs. Landis, et al.*

Attention Mr. Caldwell.

GENTLEMEN:

There are enclosed herewith copies of papers which we have today filed in the United States Supreme Court.

The Record was sent to the Clerk on yesterday so I am informed by Mr. Hill.

Very truly yours,

GEORGE COUPER GIBBS,  
*Attorney General.*

By TYRUS A. NORWOOD,  
*Assistant Attorney General.*

Enc.  
TAN:G.

**EXHIBIT "7".**

UNITED STATES DISTRICT COURT; NORTHERN  
DISTRICT OF FLORIDA, GAINESVILLE DIVI-  
SION.

Equity No. 12.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,  
*Complainants,*

*against*

GEORGE COUPER GIBBS, Individually and as Attorney General of the State of Florida; E. DIXIE BEGGS, JR., Individually and as State Attorney for the First Judicial Circuit of Florida; O. C. PARKER, JR., Individually, and as State Attorney for the Second Judicial Circuit of Florida; A. K. BLACK, Individually, and as State Attorney for the Third Judicial Circuit of Florida; WILLIAM A. HALLOWES, III, Individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. HUNTER, Individually and as State Attorney for the Fifth Judicial Circuit of Florida; CHESTER B. McMULLEN, Individually and as State Attorney for the Sixth Judicial Circuit of Florida; MURRAY SAMS, Individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. ADKINS, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; MURRAY W. OVERSTREET, Individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. GRADY BURTON, Individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. WORLEY, Individually and as State Attorney for the Eleventh Judicial Circuit of Florida; ROY D. STUBBS, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. REX FARRIOR, Individually and

as State Attorney for the Thirteenth Judicial Circuit of Florida; JOHN H. CARTER, JR., Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; LOUIS F. MAIRE, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "JOHN DOE" and "RICHARD ROE", *Defendants*.

### **Proposed Supplemental Bill of Complaint.**

The complainants, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, by their undersigned counsel, bring this their supplemental bill of complaint herein against George Couper Gibbs, individually and as Attorney General of the State of Florida, and the other defendants named in the caption hereinabove, and say:

1. Since the filing of the original bill of complaint herein, certain material facts have occurred, as are hereinafter alleged.

2. The original complaint herein included as a defendant Cary D. Landis, individually and as Attorney General of the State of Florida, who has since departed this life, as will be more fully hereinafter set forth.

3. On the 3rd day of March, 1938, this cause came on for hearing before a Statutory Three-Judge Court, upon the application of the complainants for an interlocutory injunction, and the motion of the defendants to dismiss the bill of complaint. On the 4th day of April, 1938, the Court entered an order granting the application for an interlocutory injunction, enjoining the defendants from enforcing the State Statute described in said bill of complaint, to wit, Chapter 17807, Laws of Florida, 1937, General Laws, Vol. 1, pp. 204-214 inclusive, and denying the motion of the defendants to dismiss the bill of complaint.

4. On the 25th day of April, 1938, the defendants petitioned for the allowance of an appeal from said order of April 5, 1938, to the Supreme Court of the United States. On August 15, 1938, the defendants other than George Couper Gibbs, filed their record on appeal and docketed such appeal in the United States Supreme Court, which said appeal was allowed, and is now pending.

5. Thereafter, on the 10th day of May, 1938, the defendant, Cary D. Landis, who was named a party defendant in said action, individually and as Attorney General of the State of Florida, departed this life, and on the 16th day of May, 1938, George Couper Gibbs became, and is now, the duly appointed, qualified and acting Attorney General of the State of Florida. Said George Couper Gibbs is a citizen and resident of the State of Florida.

6. On August 15, 1938, the above named defendants, other than George Couper Gibbs, as appellants, filed in the United States Supreme Court a "Suggestion of Death" of Cary D. Landis, deceased.

7. During the lifetime of Cary D. Landis, deceased, he was represented by Tyrus A. Norwood as his assistant, who at all times acted on his behalf and under his direction. At all times since the appointment of said George Couper Gibbs, the said Tyrus A. Norwood has continued to act under the direction of said George Couper Gibbs, with the same effect and in the same manner as he acted for the late Cary D. Landis, since the enactment of the said State Statute.

8. The late Cary D. Landis through his said assistant, Tyrus A. Norwood, threatened to enforce the State Statute and the penalties thereof against complainants if they should violate or attempt to violate any of the provisions thereof, and more particularly threatened to prosecute complainants thereunder should they attempt to sue for infringement of their copyrights in any Federal Court in the State of Florida. Such threat was made in open court on



the application for interlocutory injunction, and by the following letter written on March 7, 1938.

"STATE OF FLORIDA,

"Office of the Attorney General,

"Tallahassee.

"March 7, 1938.

"Honorable Rufus E. Foster,  
Judge, United States  
Circuit Court of Appeals,  
New Orleans, Louisiana.

"Re Gene Buck *et al.* vs. State of Florida *et al.*

"DEAR JUDGE FOSTER:

"Since returning from New Orleans I have been thinking that a statement I made before you in the argument of the above case to the effect that 'if the plaintiffs in this case sued for an infringement of their copyrights in the Federal Courts within the State of Florida, that the Attorney General and State's Attorneys would not prosecute them', was not absolutely clear.

"In order to be fair to the Court, I would like to state that what I meant by the above remark was that the Attorney General and the State's Attorneys of this State would not prosecute any of the individual complainants if they brought suit in the Federal Courts of this State against persons residing within the State for infringement of copyrights, but if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute it under the pro-

visions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts.

"Yours very truly,

"(Signed)

CARY D. LANDIS,

*"Attorney General,*

By TYRUS A. NORWOOD,

*"Assistant Attorney General."*

"TAN-a.

"CC: Hon. A. V. Long, Gainesville, Florida.

"Hon. Louis W. Strum, Jacksonville, Florida.

"Hon. Frank Wideman, West Palm Beach, Florida."

9. Upon information and belief, said Tyrus A. Norwood has been instructed by said George Couper Gibbs to act in his capacity as Assistant Attorney General in appearing for the State's Attorneys in this action; the purpose and object of the appearance of said Tyrus A. Norwood in this action since the death of the late Cary D. Landis, has at all times been to have the interlocutory injunction heretofore entered herein vacated so that the said George Couper Gibbs and the said Tyrus A. Norwood and the said defendant State's Attorneys will be free to enforce the terms and provisions of the State Statute against the complainants herein.

10. Said George Couper Gibbs directly and through his assistant, Tyrus A. Norwood, has adopted and continues and threatens to adopt and continue the action of his predecessor Cary D. Landis, deceased, in enforcing the State Statute, which is in violation of the Constitution of the United States; upon information and belief, said George Couper Gibbs, individually and as an official charged with the duties of enforcing said State Statute will enforce said State Statute in each and all of its terms, and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refused to accept or submit to a system of compulsory licensing; and said George Couper Gibbs will enforce the penal and confiscatory provisions of such Statute against

complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail or refuse to submit to the jurisdiction of the State Courts of Florida; and said George Couper Gibbs has threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

11. There is a substantial need for continuing and maintaining this suit against said George Couper Gibbs, as well as against defendant State's Attorneys.

Wherefore, the complainants pray:

1. That a supplemental writ of subpoena may issue to the said George Couper Gibbs, individually and as Attorney General of the State of Florida, made a party defendant hereto, requiring him to answer the bill of complaint and

this supplemental bill of complaint, fully and truthfully, but not on oath, an oath being hereby waived.

2. That said George Couper Gibbs, individually and as Attorney General of the State of Florida, be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the above named defendants, and each of them, requiring them to show cause why a temporary injunction against said George Couper Gibbs, individually and as Attorney General of the State of Florida, should not issue as prayed for herein.

3. That said State Statute, and each and every part and section thereof, be declared, as to said George Couper Gibbs, individually and as Attorney General of the State of Florida, to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute, and each and every part and section thereof, by said George Couper Gibbs, individually and as

Attorney General of the State of Florida, as hereinabove prayed for.

4. That further and general relief be granted as the nature of the complainants' case may require, or to equity may seem just and proper.

WIDEMAN, WARDLAW & CALDWELL,  
*Solicitors for Complainants.*

FRANK J. WIDEMAN,  
*Of Counsel.*

STATE OF NEW YORK,  
*County of New York, ss:*

Gene Buck, being duly sworn, deposes and says:

That he is one of the complainants in the above entitled action;

That he has read the foregoing Supplemental Bill of Complaint, and knows the contents thereof, and is fully familiar with the facts stated therein; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true.

GENE BUCK.

Subscribed and sworn to before me this 16 day of September, 1938.

[SEAL.]      GEORGE A. HOFFMAN,  
*Notary Public, State of New York.*

Kings County Clerk's No. 387.

New York County Clerk's No. 163.

Kings Co. Register No. 9077.

New York Co. Register's No. 9H159.

My commission expires March 30, 1939.





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CHARLES ELMORE OROPLEY  
CLERK

**Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 276**

RAY D. LANDIS, individually and as Attorney General of the  
State of Florida, *et al.*,

*Appellants,*

*vs.*

NE BUCK, individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF FLORIDA.

**Appellees' Brief in Support of Their Motion to Substitute  
George Couper Gibbs as a Defendant, and in Opposi-  
tion to Motion of Appellants to Vacate Decree  
of Lower Court and Direct Dismissal of  
Bill of Complaint.**

THOMAS G. HAIGHT,  
FRANK J. WIDEMAN,  
LOUIS D. FROHLICE,  
HERMAN FINKELSTEIN,  
MANLEY P. CALDWELL,

*Counsel for Appellees.*

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# Supreme Court of the United States

OCTOBER TERM 1938

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No. 276

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CARY D. LANDIS, individually and  
as Attorney General of the  
State of Florida, *et al.*

*Appellants,*

vs.

GENE BUCK, individually and as  
President of the American So-  
ciety of Composers, Authors  
and Publishers, *et al.*,

*Appellees.*

**Appellees' Brief in Support of Their Motion to Substitute  
George Couper Gibbs as a Defendant, and in Opposi-  
tion to Motion of Appellants to Vacate Decree  
of Lower Court and Direct Dismissal of  
Bill of Complaint.**

---

## Opinions Below.

The opinions of the court below are unreported. The opinion of the three-judge Federal Court for the Northern District of Florida granting appellees' motion for an interlocutory injunction was filed on April 4, 1938, and is incorporated in the record on appeal which has not yet been printed. There is no other opinion except the order of the

court below made on July 11, 1938, which denied appellants' motion in that court asking for the same relief which they now seek in this Court, and also denied a motion by appellees to substitute George Couper Gibbs, the present Attorney General of the State of Florida, in place of appellant Cary D. Landis, deceased. That order is annexed to appellees' motion papers herein as Exhibit "4".

### **Jurisdiction.**

Appellants claim that this Court has jurisdiction over this motion because of the inherent power of this Court to refrain from deciding moot controversies. In view of this claim by appellants, the only question presented by this motion is whether or not the controversy has become moot. Appellees contend that the controversy is very much alive and that the continuance of the interlocutory injunction appealed from is vital to the protection of their rights.

### **Statutes and Rules of Court.**

The merits of this appeal will involve the constitutionality of a Statute of the State of Florida (Act of June 9, 1937, Chapter 17807 Laws of Florida, 1937, General Laws, Vol. 1, pages 204-214, inclusive). The particular sections of such State Statute involved in the consideration of this motion are Sections 9 and 10-B which read in part as follows:

"Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's attorneys in their respective circuits, under the direction of the Attorney-General to institute proceedings, civil or criminal."

nal, or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof \* \* \*

Section 10-B. In the event of the failure of the *State's Attorney and Attorney-General* to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the *State's Attorney and the Attorney-General* could have instituted under the terms of this Act." (Italics ours.)

Section 131, Compiled General Laws of Florida (which will be referred to) defines the duties of the Attorney General of the State of Florida as follows:

"31. (107). *To have superintendence and direction of State attorneys*—The Attorney-General shall exercise ~~a~~ general superintendence and direction over the several State attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the State attorneys, shall give them his opinion upon any question of law. (Ch. 2098, Feb. 27, 1817, §1.)"

The duties of the State's Attorneys of the State of Florida are defined by Section 4739 of the Compiled General Laws of Florida which reads as follows:

"4739. (3005). *Before the court itself*.—It shall be his duty to appear in the circuit court within his judicial circuit, and prosecute or defend on behalf

of the State all suits, applications or motions, civil or criminal, in which the State is a party. (Ch. 1661, Aug. 6, 1868, §3.)"

Rule 19, sub-division 4 of the Rules of this Court relating to the death of a party and substitution of a successor in interest reads as follows:

"4. Where a public officer, by or against whom a suit is brought, dies or ~~ceases~~ to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

Section 11 of the Act of February 13, 1925 (Title 28 U. S. C. Section 780) reads as follows:

"780. SURVIVAL OF ACTIONS, SUITS, OR PROCEEDINGS—

(a) By or against officer of United States, District of Columbia, Canal Zone, or territory or insular possession of United States; or of county, and so forth, of such territory or insular possession. Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one

of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) *By or against officer of State, county, city, and so forth.* Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Notice of application for substitution of parties. Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (Feb. 8, 1899, c. 121, 30 Stat. 822; Feb. 13, 1925, c. 229, §11, 43 Stat. 941)." (Italics ours.)

Rule 25, sub-divisions (a) and (d) of the new rules of Civil Procedure for the District Courts of the United States read as follows:

"RULE 25. SUBSTITUTION OF PARTIES.

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or repre-



representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

\* \* \*

(d) *Public Officers: Death or Separation from Office.* When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, §11 (43 Stat. 941), U. S. C., Title 28, §780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

### **Questions Presented.**

(1) Are the appellants State's Attorneys entitled to escape the operation of the temporary injunction appealed from because of the death of the appellant Cary D. Landis, the late Attorney General of the State of Florida and the refusal of his successor George Couper Gibbs to become a party to this action?

(2) Should George Couper Gibbs be substituted as a defendant in place of deceased appellant Cary D. Landis?

### **Summary Statement.**

On April 4, 1938, the United States District Court for the Northern District of Florida, consisting of Hon. RUFUS E. FOSTER, United States Circuit Judge, Hon. LOUIE W. STRUM, and Hon. A. V. LONG, United States District Judges, entered a decree granting an interlocutory injunction restraining all the appellants from enforcing the State Statute referred to above. The persons enjoined included appellant Cary D. Landis, who was then the Attorney General of the State of Florida and the fifteen State's Attorneys for the respective circuits of that state.

On April 25, 1938, the District Court entered an order allowing appellants to appeal to this Court.

Thereafter on May 10, 1938, appellant Cary D. Landis passed away and on May 16, 1938, George Couper Gibbs was appointed as his successor in office.

On May 31, 1938, one Tyrus A. Norwood, an Assistant Attorney General of the State of Florida, allegedly appearing on behalf of the appellant State's Attorneys, filed in the court below a suggestion of the death of appellant Cary D. Landis and moved in the District Court for the precise relief now prayed for in this Court, namely, that the action be dismissed on the ground that it had abated because of the death of the late Attorney General (Ex. "B" annexed to appellants' motion to dismiss).

Appellees countered with a motion to substitute George Couper Gibbs on the ground that he was continuing the conduct of his predecessor in office, was threatening to enforce the Statute and intended to enforce it if the injunction should be vacated, and that there was a substantial need for continuing the suit and the injunction against him (Exhibit "C" annexed to appellants' motion to dismiss); and served upon appellants and George Couper Gibbs a proposed supplemental bill of complaint seeking to bring said George Couper Gibbs into the action as a party defendant (Exhibit "1" annexed to appellees' answer to motion).

Both the appellants' motion to dismiss and the appellees' motion to substitute were heard before the court below on July 11, 1938 and thereupon that court denied both motions (Exhibit "F" annexed to appellants' motion to dismiss).

On August 15, 1938, the said Assistant Attorney General Tyrus A. Norwood, claiming to appear on behalf of the appellant State's Attorneys, docketed their appeal in this Court from the decree granting the temporary injunction and filed in this Court a suggestion of the death of appellant Cary D. Landis similar to that filed in the court below on May 31, 1938 as stated above.

Thereafter, said Assistant Attorney General, Tyrus A. Norwood, made this motion to dismiss in this Court.

Appellees made a motion in this Court on September 20, 1938 to substitute said George Couper Gibbs as a defendant and appellant in place of Cary D. Landis, deceased. In that motion appellees allege that George Couper Gibbs has adopted and continues, and threatens and proposes to continue the course of conduct of his predecessor, and proposes to direct appellant State's Attorneys to prosecute appellees under the State Statute if the pending interlocutory injunction is vacated (par. 25 of appellees' motion to substitute).

### Argument.

Appellees contend that their motion to substitute should be granted, and appellants' motion to dismiss should be denied for the following reasons:

(1) The present Attorney General of the State of Florida has appeared in this action and on this appeal through his assistant and representative, Tyrus A. Norwood.

(2) In any event, the Attorney General, George Couper Gibbs is not an indispensable party, and he cannot be prejudiced because he was given full opportunity to come into this action and to defend.

(3) When the action was commenced and the decision of the court below rendered, all proper parties were before the court. The subsequent death of one party cannot justify a dissolution of the temporary injunction.

(4) The present Attorney General has continued all the acts of his predecessor which have been complained of, and will enforce the Statute against complainants if the temporary injunction against the State's Attorneys should be vacated.

(5) If there be any defect of parties by reason of the death of Cary D. Landis, appellees have six months under the Statutes and the Rules of this Court within which to substitute his successors.

(6) There is a substantial need for continuing and maintaining this suit against George Couper Gibbs, as well as against defendant State's Attorneys.

## POINT I.

**This action has not abated as to the appellant State's Attorneys.**

This action could have been commenced in the first instance without joining the deceased appellant, Cary D. Landis.

The State Statute imposes the duty of enforcement upon the State's Attorneys and not upon the Attorney General. The State's Attorneys are at most instructed to act under the Attorney General's direction. The action, however, is their own, and any suit or proceeding under the Statute must be brought by the State's Attorneys.

This is similar to the situation in *Colorado v. Toll*, 268 U. S. 228 (1925), where a bill was brought to enjoin the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which were promulgated by the Secretary of the Interior, who was charged with control of the park under the Act of January 26, 1915, Ch. 19; 38 Stat. 798. The statute provided that the director of the National Parks Service "shall, under the direction of the Secretary of the Interior, have the supervision, management and control of the several National parks \* \* \*." The statute further authorized the Secretary of the Interior to make necessary regulations for the use of the parks, and to appoint such employees as he should deem necessary. The defendant Superintendent of the Rocky Mountain National Park was charged with the duty of carrying out the instructions of the Secretary of the Interior, who had made certain regulations respecting the use of automobiles in the Rocky Mountain National Park. In overruling the defendant's objection that the Secretary of the Interior should have been made a party, Mr. Justice HOLMES said at page 230:



"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it *may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431. Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620.* As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question. Also the direct appeal to this Court is proper as the State complains of an infringement of its right in the highways and of its other reserved powers and the case as made involves the construction of the Constitution of the United States." (Italics ours.)

This decision has been followed by the lower federal courts. In *Berdie v. Kurtz*, 75 F. (2d) 898, and *Darger v. Hill*, 76 F. (2d) 198, the Ninth Circuit Court of Appeals held that the Secretary of Agriculture was not an indispensable party to an action to restrain the enforcement of certain regulations made by the Secretary under authority allegedly granted to him by the Agricultural Adjustment Act (Tit. 7, U. S. C., c. 26). It was held sufficient to join as defendants the person in charge of the Los Angeles office of the Field Investment Section of the Agricultural Adjustment Administration of the United States Department of Agriculture, the Market Administrator appointed by the Secretary of Agriculture, and the United States Attorney for the Southern District of California.

*Yarnell v. Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5), held that the Secretary of Agriculture was not an indispensable party to a proceeding to enjoin a control committee selected in the manner provided in a marketing agreement and license issued by the Secretary

under the Agricultural Adjustment Act, from enforcing committee regulations governing the citrus industry.

*Ryan v. Amazon Petroleum Corp.*, 71 F. (2d) 1 (C. C. A. 5) held that the Secretary of the Interior was not an indispensable party to a suit to enjoin an agent of the Department of the Interior and the United States Attorney and the United States Marshal, from enforcing certain portions of the National Industrial Recovery Act (48 Stat. 195), and of the Regulations and Code for the Petroleum Industry promulgated thereunder. The Circuit Court of Appeals, however, denied the injunction on the merits. This Court reversed the decision of the Circuit Court of Appeals and granted the injunction, thus recognizing the propriety of suing inferior officers without joining their superiors. *Panama Refining Co. v. Ryan*, 293 U. S. 388. Judge SIBLEY writing for the Fifth Circuit in the *Ryan* case, said at page 4 (71 F. [2d]) :

"The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined. Although the actors may be authorized and incited by him so that he would be a proper codefendant if he were within the court's reach, the court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they are acting for others. *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *State of Colorado v. Toll, Supt.*, 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927. This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defendants in their alleged trespasses against complainants' rights. There is no more need to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code or the Congress because it enacted the statute."

The District Courts have likewise followed the rule laid down by this Court in *Colorado v. Toll*, *supra*; *Consolidated Gas Co. v. Hardy*, 14 F. Supp. 223, 225 (S. D. N. Y.); *Chester C. Fosgate Co. v. Kirkland*, 19 F. Supp. 152, 156, 158, (S. D. Fla.).

The injunction order appealed from does not restrain appellants from carrying out instructions heretofore given by George Couper Gibbs, but rather restrains them from carrying out the duty directly imposed upon them by the State Statute. The decree appealed from was obtained after a hearing in which all parties at that time interested were represented, including the deceased Attorney General.

The appellant State's Attorneys informed the court below that: "if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute it under the provisions of Section 1 of the Act (State Statute), regardless of whether the suit was brought in the State or Federal Courts" (Exhibit "5" annexed to appellees' answer).

The State's Attorneys have threatened to enforce the Statute, and they cannot be heard now to say that the injunction against them should be vacated because the former Attorney General is now deceased. The Attorney General is no more an indispensable party to the suit than was the United States in *Ickes v. Fox*, 300 U. S. 82; 96-97.

*Rood v. Goodman*, 83 F. (2d) 28, 32 (C. C. A. 5), cert. den: 299 U. S. 551, holds that the defect of want of parties does not go to the jurisdiction of the court to entertain the suit; but rather to its discretion as a court of equity to entertain it; that when it plainly appears that no prejudice has been done to the absent party by the decree and

that the decree as to the parties before it is right and completely effective, it ought to stand and the litigation come to an end.

*The court below properly exercised its discretion in denying appellants' motion below to dismiss the suit. Since there is no claim that the court below abused its discretion, appellants' motion in this Court should be denied.*

The decision below cannot possibly prejudice George Couper Gibbs because he has been given an opportunity to be made a party and has refused voluntarily to take part in the litigation, although his assistant has actively conducted the suit and the appeal on behalf of appellants. If George Couper Gibbs does not intend to enforce the Statute, the injunction against the State's Attorneys cannot harm him. If he does intend to enforce the Statute, he should be made a party, upon appellees' motion to substitute him in the place of Cary D. Landis. In either event, this action should not be dismissed. The merits of the appeal should be determined in the event that this Court notices probable jurisdiction.

Appellants rely on *Warner Valley Stock Company v. Smith*, 165 U. S. 28. That case, however, is not in point. It arose before the Act of February 6, 1899 (30 Stat. 822, 28 U. S. C., §780A)—at a time when there was no statute permitting the substitution of a successor to a defendant public officer who resigned his office during the pendency of an action. In that case, the plaintiff sued Hoke Smith, Secretary of the Interior and Silas W. Lamoreux, Commissioner of the General Land Office. As this Court pointed out, the main object of the bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to the plaintiff for the lands in question (p. 33). During the pendency of the action, Hoke Smith resigned as Secretary of the Interior.

The facts of that case readily show the difference between the Secretary of the Interior in that case and the Attorney General in the case at bar. There, a federal statute directed the Secretary of the Interior to make out a list of the swamp lands in certain states, and to cause a patent to be issued to the states in which such lands were located, to be disposed of by the respective states. The Warner Valley Company purchased certain lands from the State of Oregon, which had been certified by the Secretary of the Interior as swamp land. Thereafter, Hoke Smith decided that these lands were not swamp lands and refused to issue a patent to the State of Oregon. His decision was promulgated by letter from him to the local land officers in Oregon. The Warner Valley Company claimed that Hoke Smith erred in refusing to treat these lands as swamp lands and in refusing to grant a patent to the State of Oregon. The lower courts upheld a demurrer to the bill on the ground "that the whole subject remained under the control of the Secretary of the Interior until the execution of the patent", the plaintiff having contended that the duty to issue a patent became ministerial after the original determination that the lands in question were swamp lands and that the original determination could not be reversed by the Secretary of the Interior. This Court said at page 34:

*"The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13."*



This Court dismissed the bill, because under the statutes as they then stood it was impossible to substitute Hoke Smith's successor in office. Had this case arisen at the present time, the suit would not have been dismissed because Smith's successor in office could have been substituted, as appellees now ask that the successor of Cary D. Landis be substituted.

In the *Warner Valley* case, the decision as to whether the lands were swamp lands was made entirely by the Secretary of the Interior. In the case at bar, the duty to prosecute complainants under this Statute is defined by the Statute itself. The duty to prosecute is imposed directly upon the appellant State's Attorneys, who have already said that they will prosecute. The requirement of the Statute that they prosecute under the direction of the Attorney General is no different from the requirement in *Colorado v. Toll*, 268 U. S. 228, that the Superintendent of Parks act under the direction of the Secretary of the Interior.

The Attorney General of the State of Florida is not an indispensable party to this suit. His predecessor was a party at the time the suit was heard, and the present Attorney General may become a party if he so desires. He was given an opportunity to come in by a motion in the court below and by motion now pending in this Court. He cannot be prejudiced by his own refusal to become a party. On the other hand, appellees will suffer grave prejudice if their complaint should be dismissed and the Attorney General and the State's Attorneys be free to enforce against appellees the severe and drastic penalties of the State Statute.

The other cases relied on by appellants in support of their contention that this appeal has become moot are not in point. In some of them the statute in question was repealed or amended so as to excise the offending provisions (*Berry v. Davis*, 242 U. S. 468; *New Orleans Flour Inspectors v. Glover*, 161 U. S. 101; *Board of Public Utility v.*

*Compania General De Tabacos*, 249 U. S. 425). In others, the plaintiff's status so changed during the pendency of the action that the statute no longer applied to him (*Alejandro v. Quezon*, 271 U. S. 528; *Atherton Mills v. Johnston*, 259 U. S. 13). In the other cases, the facts changed pending appeal so that plaintiff no longer was in need of and could not obtain the relief prayed for (*Heitmuller v. Stokes*, 256 U. S. 359; *Duke Power Co. v. Greenwood Co.*, 299 U. S. 259).

## POINT II.

**George Couper Gibbs should be made a party to this action, as prayed for in appellees' motion to substitute him in place of appellant Cary D. Landis, deceased.**

George Couper Gibbs has actually conducted this litigation since his appointment as Attorney General, through his assistant Tyrus A. Norwood, although he has not been made a formal party. Tyrus A. Norwood holds office solely at the pleasure of Mr. Gibbs, and acts only as directed by him. He has no authority to appear in this action except to the extent that his superior, Mr. Gibbs authorizes him to do so. Mr. Norwood has stated that he will enforce this Statute against appellees. That statement was made while Mr. Landis was Attorney General, but it has not been repudiated by Mr. Norwood or Mr. Gibbs. If Mr. Gibbs is a necessary party defendant he may be brought in under the Act of February 13, 1925 (Tit. 28 U. S. C. §780), Rule 25 of the Rules of Civil Procedure, and Rule 19, Subdivision 4 of the Rules of this Court.

Nowhere has Mr. Gibbs denied that he will enforce the State Statute against complainants if appellants' motion be granted. Based on the past and present conduct of the State's Attorneys and Mr. Norwood, his intention to enforce the State Statute seems clear.

In *Allen v. Regents of University System*, 304 U. S. 439; substitution of a Collector of Internal Revenue was allowed under similar circumstances, this Court distinguishing *Ex parte LaPrade*, 289 U. S. 444, on which appellants rely, as follows (p. 445) :

"The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade*, 289 U. S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted."

In *Ex parte LaPrade*, 289 U. S. 444, upon which appellants rely, the sole defendant was one Peterson, Attorney General of the State of Arizona. After a hearing before a master and before confirmation of his report, Peterson's term of office expired and LaPrade became the Attorney General of the State. Thereupon, plaintiff served LaPrade with a notice that an application would be made to substitute him in place of Peterson. This Court pointed out that "As grounds for the substitution, plaintiff's application merely stated that each suit relates to the future discharge of the official duties of the Attorney General of Arizona and, following the language of the statute, that there is a substantial need for continuing and maintaining it and obtaining adjudication of the questions involved". *There was no allegation that LaPrade proposed, intended or threatened to continue the acts of his predecessor or to enforce the statute enactment.* In holding that the substitution of LaPrade was improper, this Court said at page 458:

"Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it."

In the case at bar, there is no suggestion that the present Attorney General considers the State Statute unconstitutional or legally unenforceable; nor is any other reason given why he may "rightly" refrain from an effort to enforce the Statute.

This Court in the *LaPrade* case left open the question of substitution of a state officer who adopts the attitude of his predecessor. But that question was squarely passed upon in *Allen v. Regents of University System*, 304 U. S. 439, cited above.

George Couper Gibbs is continuing to act in the same manner that his predecessor Cary D. Landis acted. He is acting through the same assistant, Tyrus A. Norwood. He is seeking through him to have this injunction vacated as against the State's Attorneys so that he may be free to direct them to enforce the terms and penalties of the State Statute against appellees.

The very correspondence issuing out of the present Attorney General's office in connection with this appeal is signed "George Couper Gibbs, Attorney General, By Tyrus A. Norwood Assistant Attorney General" (Ex. "6", annexed to appellees' motion to substitute).

*Allen v. Regents of University System*, 304 U. S. 439 shows that there is no longer any distinction between the law relating to substitution of state officers and that relating to substitution of federal officers. In both cases, the officers are brought in because their acts under an uncon-

stitutional statute invade the constitutional rights of the plaintiffs. The officials are sued in each case as individuals. Neither the State in the one case, nor the United States in the other is a party to the action. The Act of February 13, 1925 (Tit. 28 U. S. C., §780) makes no distinction between the two classes of officials.

George Couper Gibbs has been given notice of the application to substitute him as a party defendant. Such substitution is necessary if appellants' claim that this action has abated is sound. There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved, because the vacatur of the interlocutory injunction would subject appellees to the drastic civil and criminal proceedings and penalties provided for in the State Statute. The court below has already found that appellees would suffer irreparable injury if they were not protected by an interlocutory injunction.

### CONCLUSION.

For the foregoing reasons, it is urged that appellants' motion to vacate the decree appealed from and to direct dismissal of the bill of complaint should be denied, and appellees' motion to substitute should be granted.

Respectfully submitted,

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FRANK J. WIDEMAN,  
LOUIS D. FROHLICH,  
HERMAN FINKELSTEIN,  
MANLEY P. CALDWELL,

*Counsel for Appellees.*

September, 1938





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Supreme Court of the United States

OCTOBER TERM, 1938

No. 276

GEORGE COUPER GIBBS, Individually and as Attorney General  
of the State of Florida, *et al.*,

*Appellants,*

*vs.*

JOHN BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, *et al.*

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**APPELLEES' BRIEF.**

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THOMAS G. HAIGHT,  
FRANK J. WIDEMAN,  
LOUIS D. FROHLICH,  
HERMAN FINKELSTEIN,  
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# Supreme Court of the United States

OCTOBER TERM, 1938.

No. 276

GEORGE COUPER GIBBS, Individu-  
ally and as Attorney General  
of the State of Florida, *et al.*,  
*Appellants,*

*vs.*

GENE BUCK, Individually and  
as President of the American  
Society of Composers, Authors  
and Publishers, *et al.*

## APPELLEES' BRIEF,\*

### Opinion Below.

The opinion of the District Court for the Southern District of Florida (R. 268) is unreported.

### Questions Presented.

(1) Are the allegations of the bill of complaint, and the proofs offered to support them sufficient to sustain the jurisdiction of the court below?

(2) Did the court below abuse its discretion in granting the interlocutory injunction?

\*Italics in this brief ours unless otherwise indicated.

### Statutes Involved.

The Florida Statute (hereinafter referred to as the State Statute), the validity of which is involved, is the Act of June 9, 1937, Florida Laws of 1937, Volume 1, General Laws of Florida, 1937, c. 17807, page 204. It is printed in full in the appendix to appellants' brief, and at R. 64-68. Its provisions are summarized below (pp. 9-20).

This case also involves the Act of March 4, 1909, as amended (35 Stat. 1075, Tit. 17 U. S. C., as amended) hereinafter referred to as the "Copyright Act", which is printed in Copyright Office Bulletin No. 14. Copies of this bulletin will be handed to the Court on the argument.

### Statement of the Case.

#### A. Description of Appellees.

This suit was brought on the *joint* behalf of all members of the appellee, American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"), an unincorporated association organized under the laws of the State of New York, consisting of over 1,000 composers and authors and 123 publishers of music (R. 1, 2, 16), and *also* on behalf of each appellee in his *individual* capacity (R. 1-3, 5-14, 17-18, 23-34) to enjoin enforcement of the State Statute on the ground that it is in conflict with the Federal and State Constitutions and Treaties between the United States and foreign countries (R. 1-35).

The individual appellees, all of whom are members of the Society, are noted composers and authors and publishers of copyrighted music and the next of kin of deceased composers and authors (R. 2-3, 8-14, 76, 120-2, 129, 153-205).

### B. Conditions necessitating organization of Appellee Society.

The Society was organized in 1914 under the leadership of the late Victor Herbert (father of appellee Ella Herbert Bartlett), Henry Blossom, Irving Berlin, Glen McDouough, appellee Buck and others as a means of protecting American composers, authors and publishers against the unauthorized use of their copyrighted musical compositions in *public performances for profit* by owners of dance halls, cabarets, night clubs, hotels, motion picture theatres and other places of public entertainment and amusement, and for the purpose of licensing such users to perform such compositions lawfully<sup>1</sup> (R. 15-16).

It was impossible to secure recognition of these rights individually and even collectively before the formation of the Society because of the organized refusal of economically powerful groups of users to respect the copyrights in this field. Users' associations employed counsel to defend suits for infringement brought against both members and non-members of the respective associations (R. 15). *Individually*, appellees and their predecessors were helpless because they did not have the means to employ investigators throughout the country to detect infringements by performances which were fugitive, fleeting and ephemeral, and of which no record was made by users; nor had they the means to employ lawyers throughout the country to prosecute infringement suits (R. 14-15).

The right of "public performance for profit" granted under Section 1(e) of the Copyright Act was thus nullified because of the copyright owners' practical inability to en-

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<sup>1</sup>This Court has already upheld the existence of these rights under the Federal Copyright Act as applied to a performance in a hotel by live musicians, and by means of a radio receiving set equipped with a loud speaker, respectively. *Herbert v. Shanley*, 242 U. S. 591 (1917); *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931).



force their rights. Before the Society was organized there was no means by which users of music who might be willing or inclined to pay for such performances could do so, because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; for instance, a dance hall uses on the average 81 compositions per evening (R. 85); it was impossible to get in touch with the individual owners of the particular compositions, many of whom were scattered throughout the world (R. 14-15); and obviously for every user to get an individual license from the 1123 members of the Society in the United States, to say nothing of copyright proprietors who reside and are citizens of other countries (there are 44,000 of these who are members of other societies with which the appellee Society has reciprocal agreements), would have presented an impracticable task. In fact many of them keep no records, and it would cost them more for *mere bookkeeping entries* under a system of individual licensing than they now pay for a blanket license to the Society (R. 116).

The Society has continuously functioned since 1914, solely for the purpose of doing for its members what they cannot do for themselves individually, namely, licensing the right of public performance for profit upon fair and reasonable license fees, and protecting them against infringement of their copyrights; *at no time has it dealt in any commodity; it has not dealt in sheet music, nor exercised any functions with respect to mechanical rights of reproduction* (R. 15-16).

It is not suggested that appellees charge exorbitant prices; indeed, the average price paid to the Society by users of music in Florida in 1936 for the right to publicly perform for profit the compositions of approximately 44,000 composers, demonstrates that the Society is most reasonable in the matter of charges. This schedule of average prices is as follows (R. 128):

"Radio broadcasters, \$2,432.00 per year, per station.  
Motion picture theatre exhibitors, \$81.00 per year,  
per theatre.

Restaurants, \$84.00 per year, per establishment.

Hotels, \$80.00 per year, per hotel.

Dance halls, \$85.00 per year, per dance hall.

Miscellaneous establishments, \$103.00 per year, per establishment."

Congress has provided that the infringement of the performing rights of a single copyrighted composition shall entitle the proprietor to recover \$250. per infringement (Copyright Act, Section 25; *Jewell-LaSalle Realty Company v. Buck*, 283 U. S. 202).

**C. Efforts to destroy appellee Society as means of securing free use of right of public performance for profit.**

Organized resistance to the Society's activities has always had as its sole object the destruction of the right of public performance for profit, so that users might have the same free access to the copyrighted musical compositions of members of the Society that they enjoyed before 1914. Among the schemes for accomplishing this end have been attacks on the Society as an alleged monopoly, interposed as defenses to suits for infringement,<sup>2</sup> setting up sham devices to avoid liability,<sup>3</sup> bringing a suit against the Society in the New York State Courts, claiming that the Society operated in restraint of trade,<sup>4</sup> filing complaints with the

<sup>2</sup>See, e. g., *Harms v. Cohen*, 279 Fed. 276, 280 (E. D. Pa., 1922); *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (D. C. R. I.).

<sup>3</sup>See R. 123-5.

<sup>4</sup>An application for injunction against the Society brought by the Motion Picture Exhibitors League of America to restrain the Society's activities on the ground that it was an alleged monopoly, was denied in *174th Street & St. Nicholas Ave. Amusement Co. v. Maxwell*, 169 N. Y. Supp. 895 (1918).

United States Department of Justice<sup>5</sup> and the Federal Trade Commission,<sup>6</sup> introducing numerous bills in Congress seeking to amend the Copyright Act so as to permit the users of music to perform publicly for profit the compositions of the Society's members without compensation,<sup>7</sup> bringing an anti-trust suit and securing the appointment of a temporary

<sup>5</sup>Charges against the Society filed with the Department of Justice were dismissed on August 6, 1926 after investigating the Society's activities for two years, the Department pointing out the flagrant violation of copyrights by users of music in public performances for profit (R. 91-2).

<sup>6</sup>Charges against the Society before the Federal Trade Commission were dismissed on January 2, 1923 (R. 91).

<sup>7</sup>The following Bills were introduced in Congress, having as their object the amendment of the Copyright Law so as to destroy the right of public performance for profit as applied to copyrighted musical compositions, some of the bills seeking to enact legislation in many respects similar to the State Statute:

68th Congress, 1st Session: H. R. 713 (Dec. 5, 1923);

H. R. 6250 (Jan. 26, 1924); S. 2600 (Feb. 22, 1924);

S. 3078 (April 10, 1924); H. R. 8685 (Apr. 15, 1924);

H. R. 8734 (Apr. 17, 1924);

69th Congress, 1st Session: S. 2328 (Jan. 7, 1926); S. 2811 (Jan. 16, 1926); H. R. 11209 (Apr. 12, 1926);

70th Congress, 1st Session: S. 4467 (May 3, 1928);

71st Congress, 1st Session: S. 1386 (June 4, 1929);

71st Congress, 3rd Session: S. 5687 (Jan. 5, 1931);

72nd Congress, 1st Session: H. R. 10364 (Mar. 10, 1932);

H. R. 10740 (Mar. 22, 1932); H. R. 10976 (Mar. 30, 1932);

H. R. 11948 (May 7, 1932); S. 1035 (Dec. 9, 1931); S. 3985 (Mar. 2, 1932);

73rd Congress, 1st Session: S. 342 (Mar. 13, 1933);

74th Congress, 1st Session: S. 2465 (Mar. 13, 1935); S. 3047 (August 12, 1935);

75th Congress, 1st Session: H. R. 2695 (Jan. 12, 1937);

S. 2031 (Mar. 29, 1937); H. R. 10633 (May 16, 1938).

receiver and an involuntary assignment of the Society's rights in the State of Washington<sup>8</sup> (R. 14-19, 76, 86-102, 116-28).

Appellees have been compelled to establish in many litigations that the rights given to copyright proprietors to publicly perform for profit musical compositions, covered various situations in which an attempt was made to publicly perform the musical compositions for profit without paying anything therefor to the copyright proprietors.

In *Herbert v. Shanley Co.* (229 Fed. 340), and *John Church Co. v. Hilliard Hotel Co.* (227 Fed. 229), the Circuit Court of Appeals for the Second Circuit held that the rendition of a copyrighted musical composition by a hotel orchestra and by professional singers accompanied by an orchestra, respectively, where no separate charge was made for the music, did not constitute a public performance for profit within the meaning of the Act. These decisions, however, were reversed by this Court (242 U. S. 591), Justice HOLMES saying:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. \* \* \* It is enough to say that there is no need to construe the statute so narrowly."

The effort of moving picture theatre proprietors to escape the charge of infringement when *parts* of copyrighted musical compositions were played by orchestras, organs or other musical instruments during the showing of moving pictures,

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<sup>8</sup>An anti-trust suit under the State Laws brought against the Society by the Attorney General of Washington was dismissed and the receivership and assignments set aside on June 8, 1936. *State of Washington v. American Society of Composers, Authors and Publishers*, Superior Court, Thurston County, No. 16114 (unreported, printed at R. 130-132; See R. 93).

and where no separate charge was made for the music, was met by adverse decisions in the United States District Court for the Eastern District of Pennsylvania (*Harms v. Cohen*, 279 Fed. 276) and in the Circuit Court of Appeals for the Fifth Circuit (*Pastime Amusement Co. v. M. Witmark & Sons*, 2 F. (2d) 1020, aff'g 298 Fed. 470), as well as in a number of other courts whose decisions have not been reported.

In many cases it was held that there was a performance where the composition was rendered by a phonograph record or perforated music roll upon a player piano. *M. Witmark & Sons v. Calloway*, 22 F. (2d) 412 (D. C. E. D. Tenn.); *Buck v. Lester*, 24 F. (2d) 877 (D. C. E. D. S. C.); *Buck v. Heretis*, 24 F. (2d) 876 (D. C. E. D. S. C.); *Berlin v. Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz v. Buck*, 40 F. (2d) 501 (C. C. A. 5); cert den. 282 U. S. 880.

Finally, this Court in *Buck v. Jewell-LaSalle Realty Company*, 283 U. S. 191, established that the re-broadcasting by hotels or other public places of musical compositions which had been broadcast by radio, was within the protection of the Copyright Act. It had been previously held in a number of cases that broadcasting by radio of the rendition of a copyrighted musical composition constituted an infringement of the copyright.<sup>8-a</sup>

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<sup>8-a</sup>*M. Witmark & Sons v. Bamberger*, 291 Fed. 776 (D. C. N. J.); *Remick v. General Electric Co.*, 4 F. (2d) 160 (D. C. S. D. N. Y.); *Remick v. American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6, reversing the District Court for the Southern District of Ohio); certiorari denied, 269 U. S. 556; *Remick v. General Electric Company*, 16 F. (2d) 829 (D. C. S. D. N. Y.); *Messenger v. British Broadcasting Company, Ltd.*, 137 L. T. Rep., 810 (1927); 2 K. B. 543; (King's Bench Division of the English High Court of Justice); same case on appeal, Law Rep. (1928), 1 K. B. 660 (Court of Appeal); 140 L. T. Rep. 227 (1929) (House of Lords); *Chappell & Co., Ltd. v. Associated Radio Co. of Australia*, 50 Victorian Law Rep., 350 (1925), (Supreme Court of Victoria).



All these attempts to deprive appellees and others similarly situated of rights granted to them by Congress having failed, the users conceived the idea of nullifying these rights through state legislation (R. 18-19). As a result, statutes substantially along the lines of the State Statute were passed in Montana, Washington, Nebraska and Tennessee.<sup>9</sup>

The users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrighted music (R. 116-19). Although the statutes purport to be enacted in the public interest, the fact is that they were sponsored solely by those groups of users who have attempted to escape payment of copyright royalties through all the modern devices of lobbying at the command of organizations of radio broadcasters and operators of amusement enterprises (R. 126:8).

#### **D. Summary of provisions of State Statute and practical effect thereof.**

The provisions of the State Statute show clearly that they attempt to nullify the provisions of the Copyright Law which give to owners of copyrighted musical compositions the exclusive right of *public performance for profit* as interpreted by the decisions of this Court (*Herbert v. Shanley*, 242 U. S. 591; *Buck v. Jewell LaSalle Realty Co.*, 283 U. S. 191).

SECTION 1 makes it unlawful for authors, composers, publishers, owners, or their heirs, of copyrighted musical compositions to form any society, association, corporation or group (called a "combination" in the Statute) when the

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<sup>9</sup>These Statutes and the litigation challenging their validity are discussed *infra*, point X (p. 64).

members therein constitute a substantial number of the persons "*within the United States*" owning or controlling musical compositions and when one of the objects of the "combination" is the determination and fixation of license fees for any use of copyrighted music for private or public performance for profit. The collection of license fees so fixed from anyone using music in the conduct of his business, particularly theatres, radio stations, moving picture houses, hotels, restaurants, clubs and dance halls, is made unlawful; and collection thereof is prohibited in any court within the boundaries of Florida, and such collection or attempted collection is made a "separate offense". Such a "combination" is declared to be an unlawful monopoly *in the State of Florida*, and the fixing of prices or collection or attempted collection of license fees by it is declared illeg and in restraint of trade and is declared to be an intrastate transaction within the State of Florida.

This Section is obviously aimed at the Society since it consists of more than 1,000 American composers and authors and 123 American publishers, and it licenses the works of its members for a single fee which permits users to give non-dramatic performances of the separate musical compositions copyrighted or composed by members of the Society before or during the term of the respective licenses (Exs. "F", "G" and "H", R. 69, 70, 73, 74).

This Section, by providing that such a "combination" shall be in restraint of trade, makes it impossible for the Society to show that in fact it does not restrain trade.

SECTION 2-A requires all authors, composers and publishers to specify on the musical composition in whatever form it may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof "so arrived at and determined for all uses and purposes". When any purchaser or user acquires a copy of such composition in any form within the State of Florida and pays

the specified selling price to the seller or publisher thereof, the purchaser or user may use or render or cause or permit others to use or render the copyrighted musical composition by means of actors, orchestras, bands or through radio loud speakers or radio receiving, broadcasting or rebroadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise for private or public performances for profit without paying any further license fees. In the event of receipt of payment for such sheet of music, record or other device by anyone, the copyright owner "shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit".

This, of course, means that the selling price of sheet music and phonograph records is to be the only compensation which a copyright proprietor may receive for his work in the State of Florida, notwithstanding that the copyright act, as will be hereinafter shown, gives to such proprietors *several separate and distinct rights* for which, by virtue of his exclusive rights, he may charge one who wishes to avail himself of any of those rights respectively, whatever the copyright proprietor chooses, unless specifically limited by the copyright statute.

The only alternative would be for a copyright proprietor to charge for sheet music or phonograph records for private use, a price large enough to compensate him not only for the physical thing thus sold but for the performing rights as well. In this way the ordinary purchaser of sheet music or phonograph records would be penalized. This, of course, would result in penalizing purchasers of sheet music or phonograph records for private use, and, of course, would result in a diminution of sales.

This Clause nullifies Section 41 of the Copyright Act and the decisions interpreting that Section which hold that the purchase of a sheet of music does not give the purchaser the right to perform the same publicly for profit (see argu-

ment, *infra*, p. 43). It also nullifies Subdivision (e) of Section 1 of the Copyright Law which expressly provides that the payment of the statutory royalty of two cents to the copyright proprietor for the privilege of making a phonograph record, music roll or other part of an instrument serving to reproduce mechanically the musical work, shall not free such articles or devices from further contribution to the copyright "in case of public performance for profit" (Copyright Office Bulletin No. 14, p. 8).

The manner in which the Statute invades the exclusive rights granted to copyright owners under Article 1, Section 8 of the Constitution and Section 1 of the Copyright Act will be further discussed under Point II. of this brief (p. 41).

Under SECTION 2-B, if the selling price is not fixed and collected upon the sale of a copy of the composition or an article or device for reproducing it, as provided in Section 2-A, the purchaser may use the same for public performance for profit without payment of any further license fee "free from any and all liability in any *infringement* or *injunction* suit, or in any action to collect damages \* \* \* in any Court *within* this State".

This Section attempts to prevent the copyright owner from suing for infringement in the Federal Court to protect a right vouchsafed to him by the Federal Copyright Act. The prohibition applies whether the copyright owner is a member of a "combination" or an individual.

The prohibition of this Section is apparently made effective by Sections 8 and 16-A, the first of which subjects anyone to fine and imprisonment who attempts "to act within this State in violation of the terms of this Act", and the second, permits anyone who has been damaged by anything "forbidden in this Act" to sue in the State Court and recover his damages and attorney's fees.

SECTION 2-C reserves to a copyright owner the exclusive right to resell, copy, print, publish and vend the copyrighted

work after a sale in the manner aforesaid, but apparently all other rights under the copyright are given to the purchaser of a *copy* of the work, or an article or device for reproducing it. This Section further provides that authors and composers may fix the price to be charged for the use of the copyrighted musical composition independently of a "combination", but it does not give them the right to make such a charge apart from the price paid for purchase of a sheet of music or an article or device aforesaid.

SECTION 3 nullifies all *existing* contracts or licenses within the State made by any "combination" and declares that they were intra-state transactions and in restraint of trade. All parties bound by such contracts may enjoin enforcement thereof, and all agents, members or representatives of any "combination" attempting to enforce the terms of such existing contracts are guilty of violating the Statute and *subject* to its *penalties*.

SECTION 4-A gives a license to all operators of radio broadcasting, radio receiving or radio re-broadcasting stations in Florida to "receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination" without payment of any license fee.

In other words, all broadcasting stations in Florida are given the right to perform the copyrighted musical compositions owned by appellees without regard to the rights granted to appellees under the Copyright Act.

This Section would, of course, nullify what this Court held was one of the exclusive rights conferred upon a copyright proprietor by the Copyright Act in *Buck v. Jewell-LaSalle, supra* (283 U. S. 191).

SECTION 4-B permits Florida radio stations to receive, use, broadcast or re-broadcast within the State copyrighted



musical compositions which originate or emanate from an affiliated station without the State. The out-of-state broadcaster is prohibited from charging the Florida broadcaster any license fee for the purpose of paying or repaying the same to any "combination", and any out-of-state broadcaster attempting to collect such fees is declared to be an agent and representative of such "combination" and subject to the penalties of the Statute.

If this Section were valid, broadcasting stations in New York and other large cities from which musical programs emanate on national net works (R. 26-7) would be required to pay the license fees which are now paid by radio broadcasting stations in Florida, without any right on the part of such out-of-state broadcasting stations to be reimbursed for the payment of such license fees. The only alternative left to appellees would be to require their licensees out of the State of Florida so to control their programs that the compositions could not be "picked up" by broadcasting stations in the State of Florida. This would seriously interfere with interstate commerce and would prevent radio broadcasting stations, both within and without the State of Florida, from operating in the public interest. As a matter of fact, there is no way by which appellees can prevent performances of their works by means of radio broadcasting from crossing the borders of the State of Florida and being heard within that State.<sup>10</sup>

SECTION 5-A authorizes moving picture theatres and other places for amusement and public performance within the

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<sup>10</sup>This Statute would seriously hamper operations under the Federal Communications Act (48 Stat. 1064, Tit. 47 U. S. C. §§151-609) which is based on the fact that all broadcasts are of an interstate nature (cf. *Fischer's Blend Station, Inc. v. Tax Commission*, 297 U. S. 650 (1936); *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266 (1933)).

State to perform by means of so-called "live talent", loud speakers, radio sound production or reproduction apparatus or electrical transcriptions or any other means whatsoever, copyrighted musical compositions, the copyrights of which are owned or controlled by any "combination", without payment.

This gives the same exemption to theatres and similar places of amusement that Section 4-A gives to broadcasting stations.

The effect of this Section is to outlaw any composer, author or publisher who is a member of a "combination" described in Section 1, and to allow anyone to pirate his exclusive public performance rights without any compensation whatever.

SECTION 5-B gives the same exemption from operation of the Copyright Law to such theatres and other places of amusement that Section 4-B gives to radio broadcasting stations, except that the owners of amusement enterprises mentioned in Section 5-B are permitted to perform without payment any compositions where such Florida music entrepreneur has a contract with someone from without the State who supplies the Florida enterprise with radio broadcasts, electrical transcriptions, sound production instrumentalities or live talent. In such case, the person supplying such talent from outside the State is prohibited from making any charge for purposes of repayment to any "combination".

This Section, compels orchestras and bands, as well as radio broadcasters and manufacturers of electrical transcriptions who supply music from a state in which appellees' activities are lawful, to pay license fees for performances within the State of Florida without being permitted to obtain reimbursement from the Florida enterprise to which they supply the music. This obviously interferes with interstate activities of the various industries supplying the means

for giving public performances for profit in the State of Florida, and in addition places such out-of-state persons at a disadvantage in competing with similar Florida enterprises which are permitted to supply such talent free of any royalties by reason of the exemption granted to them in Section 5-A, as well as Sections 1, 2-A and 2-B.

SECTION 6 grants the same exemption to Florida users that is granted to them by Sections 4-A and 5-A when the means of performances are supplied from without the State *even where the copyright owner is not a member of a "combination"*. That Section provides that where such performances are made possible by means of radio broadcasts, sound production instrumentalities or entertainers coming from *without* the State, all liability for copyright infringement shall rest upon the person outside the State who makes the performance possible or sends the performers into the State; "and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State". The Section recites that such performances within the State by means of instrumentalities or persons coming from without the State are "intra-state business".

This Section, like Sections 2-A and 2-B, shows clearly the purpose of this Statute. It is not aimed at monopolies or combinations in restraint of trade. Owners of Florida amusement enterprises are given the right to make free use of copyrighted works in public performances for profit regardless of whether the owners of such copyrighted compositions are members of a so-called "combination". The purpose of this Section is obvious. If perchance appellees

should find it possible to cease their collective licensing through the Society and should attempt to exercise their rights individually (which we have already seen would be impossible as a practical matter), the State Statute would bar them from asserting their rights because under Sections 2-A and 2-B a sale of any copy of the composition or of any article or device from which it could be reproduced would bar them from further licensing the right of public performance for profit; and if appellees, attempting to operate individually, should fix the price for a sheet of music at a figure high enough to compensate them for public performances for profit, Florida users would then need only to resort to the device of engaging their entertainers or receiving their broadcasts or records or electrical transcriptions from a point *without* the State, thus exempting them from any obligation to pay copyright royalties.

Under SECTION 7-A, if any such "combination" has any representative in the State of Florida, the "combination" is deemed to be doing business in that State, and service of process may be had upon such representative with "the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State".

Since appellees do not do business in the State of Florida, the Statute would enable the State Courts to secure jurisdiction over them so as to deprive them of their property and subject them to the penalties of the Statute, without being personally present within the State.

SECTION 7-B subjects all persons negotiating for or collecting or attempting to collect license fees or acting as representatives or agents for any "combination" to all the penalties provided for violations of the Statute.

SECTION 8 provides for a penalty of not less than \$50.00 nor more than \$5,000.00 and imprisonment of not less than one nor more than ten years, or both, for any "combination" or any representative or agent of such "combination", or of any firm or corporation attempting to aid or which aids any such "combination" in violation of the Statute.

The severe penalties of this Section and of subsequent Sections must be read together with Section 13, which provides that "the rights and remedies and provisions herein provided shall be and are hereby declared to be *cumulative* to all other rights, remedies and provisions now provided under the laws of the State of Florida".

SECTION 9 furnishes means of enforcement, in addition to the fines and imprisonment provided for in Section 8. Under Section 9 the State Courts are given jurisdiction to prevent and restrain violations of the Statute and requires the appellants, State's Attorneys in their respective circuits, under the direction of appellant Attorney General, upon any complaint of any party aggrieved to institute proceedings, civil or *criminal*, or both, under the terms of the Statute against any "combination" and its members, agents or representatives "to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof".

All these proceedings may of course be brought against appellees if they have any representative within the State, by service of process on such representative under Section 7-A.

SECTION 10-A authorizes any person to recover damages resulting from a violation of the Statute, together with costs and attorney's fees.

In other words, if appellees should attempt to issue licenses or collect under existing contracts in the State of Florida they will be liable not only to the penalties de-



scribed in Section 8 and proceedings described in Section 9, but also to a civil proceeding for a recovery of any amounts collected, in which proceeding they will be subjected to the usual costs, plus attorney's fees.

SECTION 10-B permits any party aggrieved to bring a civil suit if the State's Attorney and the Attorney General fail to act as provided in Section 9.

SECTION 11-A provides that in any proceeding under the Statute (whether an action by the Attorney General or an action by a person aggrieved for the recovery of damages), any attorney for the plaintiff may file in the State Court where the action is pending, a petition praying that defendants be required to file in Court "exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants".

SECTION 11-B provides that a failure to furnish such evidence requires a court to adjudge a defendant guilty of contempt and to assess a fine of \$100. for each day of his refusal to furnish such evidence. If they should refuse to furnish such evidence for a single month, the penalties under this Section alone would equal or exceed \$3,000., and if they should refuse to do so for a year or more, the penalties would exceed \$36,000.

SECTION 12 provides that the invalidation of one section shall not invalidate the remaining portions of the Act.

SECTION 13 provides that nothing in the Act shall be construed as repealing any other law in reference to matters contained in the Statute, and that the rights and remedies and provisions therein provided shall be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

The cumulative penalties referred to are those contained in Florida Compiled Laws (1927), Article 12, Section 7948, which imposes *additional* penalties of not less than \$50, nor more than \$5,000, and/or imprisonment from one to ten years upon persons combining to restrain trade. *Each day during the continuance of the violation is made a separate offense.* This section of the Compiled Laws is made directly applicable by a recital in Section 1 of the State Statute declaring that any combination condemned by such State Statute is "illegal and in restraint of trade".

### E. Proceedings in the Court Below.

Appellees filed their bill of complaint in the court below wherein they sought an injunction, both temporary and permanent, against appellants, officials of the State of Florida, charged by the State Statute with the enforcement of the provisions thereof, from taking any proceedings to enforce the statute. The allegations of the bill were supported by voluminous affidavits (R. 76-205). Appellees presented at the same time a motion for a temporary injunction. Pursuant to the statute, a Three-Judge Court, consisting of Judge FOSTER, a Circuit Judge for the Fifth Circuit, Judge LONG, a District Judge for the Northern District of Florida, and Judge STRUM, a District Judge for the same District, was convened (R. 75) to hear plaintiff's application. Appellants filed a motion to dismiss the bill of complaint (R. 205-209), a motion to deny plaintiff's application for a preliminary injunction (R. 210-211) and affidavits in support of the latter motion (R. 211-268).

These various motions were heard by the Court and the motion to dismiss the bill was denied and the preliminary injunction granted (R. 268-271). Subsequent to the filing of the opinion and the entry of the order thereon, the Court made special findings of fact and conclusions of law (R. 276-284).

### Summary of Argument.

For a summary of the argument, we refer the Court to the captions and sub-captions of the points hereinafter advanced. Any other summary within permissible bounds would be inadequate.

### ARGUMENT.

Interlocutory injunctions have been granted restraining the enforcement of Statutes in Nebraska and Tennessee—the former substantially identical with the Florida Statute and the latter substantially identical with the Washington Statute which is before the Court in Case No. 329—In *Buck v. Swanson* (Unreported, D. C., Neb. Docket #Eq. 562, *per curiam* opinion by Hons. ARCHIBALD K. GARDNER, C. J., THOMAS C. MUNGER, D. J., and JAMES A. DONOHUE, D. J., Nov. 13, 1937); and in *Buck v. Keaton* (Unreported, Middle Dist. Tenn., Docket #Eq. 728, interlocutory decree entered by Hons. XENOPHON HICKS, C. J., JOHN J. GORE, D. J., and GEORGE C. TAYLOR, D. J., Dec. 1, 1938).

The opinion and decree in *Buck v. Swanson*, *supra*, are printed at R. 133, 134.

An appeal is now pending in this Court from the decision of the District Court for the Western District of Washington dismissing the bill of complaint in an action to restrain enforcement of a Washington statute seeking to accomplish the same object as the State Statute (October Term, 1938,

No. 329). In that case, the District Court dismissed the bill for lack of jurisdiction, after withholding a decision for nearly eleven months. A similar decision was rendered on December 28, 1938 by the United States District Court for the District of Montana on an application for interlocutory injunction to restrain enforcement of a statute of that State (Ch. 90, Laws of Montana, 1937) similar to the Washington statute (*Carl Fischer, Inc. v. Shannon*, D. C. Mont., Helena Div. #1537). It should be noted that the motion was argued April 23, 1937 but a decision was not rendered for twenty months and then only on the eve of the argument of the case at bar in this Court. The same Circuit Judge sat in both of these cases.

## I.

### The Court below had jurisdiction.

As appellants at the outset of their brief question the jurisdiction of the Court below, we have deemed it advisable to answer this contention before discussing the merits of the case.

#### A. The Controversy Involves More Than \$3,000.

The Court below *specially* found that "the matter in controversy exceeds \$3,000., exclusive of interest and costs" (R. 278). Under Rule 52 of the New Rules of Civil Procedure, this finding may not be set aside "unless clearly erroneous."

(1) THE VALUE OF THE MATTER IN CONTROVERSY IS IN EXCESS OF \$3,000. AS TO APPELLEES JOINTLY.

In their motion to dismiss the bill, appellants urge (Paragraphs 2 to 6, R. 206-207) "that it affirmatively appears from the *allegations* of the bill or complaint, and the

*exhibits attached thereto*, that the jurisdictional amount of \$3,000., exclusive of interest and costs, is not involved in this suit". Each of these two sections gives a different reason for the quoted averment. In their motion to deny the interlocutory injunction, they ask that each of the allegations of their motion to dismiss the bill be considered as grounds for the denial of the interlocutory injunction. The affidavits filed by *appellants* do not attempt to support the claim that the jurisdictional amount of \$3,000. is not in controversy. Appellees' affidavits on the contrary support the allegations of the bill of complaint in this respect. The question, therefore, is whether the bill of complaint on its face as well as together with the supporting affidavits, show that the jurisdictional amount is involved, or if not, whether the case falls within that class of suits that may be brought in the Federal Court to protect a suitor's rights secured by the Federal Constitution, in which the amount in controversy is immaterial.

This action is brought on behalf of all members of appellant Society (an unincorporated association) to redress an injury to property rights, in which all of such members have a joint and common interest by reason of their assignments to the Society and their memberships therein (R. 1-2, 16-17; Exs. "B", "C", and "D", R. 37, 41, 44). Such joinder is permissible under Equity Rule 37, which was in effect when this action was brought.<sup>11</sup>

The action was brought on behalf of the members by Gene Buck, the President of the Society (R. 2, par. 2). The case involves, of course, a question of common or general interest to all of these members who constitute a class so numerous as to make it impracticable to bring them all

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<sup>11</sup>"RULE 37. \* \* \* All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs \* \* \*"



before the court. Consequently, a suit on their behalf by Mr. Buck was authorized under Equity Rule 38, which reads as follows:

"RULE 38. REPRESENTATIVES OF CLASS.—When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Moreover under Section 12 of the General Associations Law of the State of New York, the domicile of all but one of the appellees, this action has been properly brought in the name of Gene Buck. This section is quoted in the footnote.<sup>12</sup>

Appellees jointly will lose a sum in excess of \$59,000. each year for more than three years because the Statute invalidates 367 license agreements between the Society and users in Florida from which the Society received \$59,306.81 in 1936—an average year (R. 24-6). Exhibits "F", "G" and "H" (R. 69, 73, 74) are typical license agreements between the Society and Florida users.

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<sup>12</sup>"§12. [N. Y. Laws, 1920, c. 915, §6, amended N. Y. Laws, 1932, c. 609, §2.] *Action or proceeding by unincorporated association.* An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members."

\*[OMITTED THROUGH ERROR IN PRINTING.]

See also Rule 23 of Federal Rules of Civil Procedure; *Smith v. Swormstedt*, 16 How. 288, 302-3; *Beatty v. Kurtz*, 2 Pet. 566, 584-5; *Local Union No. 497 v. Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A., 8); *Buck v. Elm Lodge*, 83 F. (2d)

If the Society<sup>12-a</sup> fails to comply with the Statute, it may be fined \$5,000. for each violation of the Statute under Section 8; it may be dissolved under Section 9 and thus lose the benefit of its contracts throughout the country, including licenses to radio broadcasting stations throughout the country from which it receives annually \$3,200,000 (R. 104). These existing contracts do not expire until December 31, 1940 (R. 69). If it attempts to collect license fees, it will be subjected to suits under Section 10-A to recover the same, plus costs and attorney's fees, thus subjecting it to 367 possible actions. If it fails to supply evidence which will incriminate it under the Statute, it will suffer a penalty of \$100. for each day of refusal to do so under Sections 11-A and 11-B. In addition, under Section 13 which makes the penalties cumulative, the Society will be liable to similar fines of \$5,000. and \$100. per day, respectively under Article 12, Florida Compiled Laws 1927, Section 7948, which applies to combinations in restraint of trade. Section 1 of the State Statute defines the Society as such a combination, regardless of whether in fact it does or does not restrain trade. Thus by the State Statute, the Society is declared guilty of a violation of an earlier Statute intended to regulate and punish combinations in *actual* restraint of trade. The amount in controversy is determined by the *joint* interest of all members of the Society since the rights affected by the Statute are joint. Since appellees' interest in copyrighted compositions of which the exclusive performing rights have been assigned to the Society (and which the Society in turn has the right to license and has licensed to others on behalf of all its members) is common and undivided, it is enough that their interests *collectively* equal the jurisdictional amount. *Troy Bank*

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<sup>12-a</sup>When the "Society" is referred to it will be understood that we mean the members of the unincorporated association in their joint capacity.

v. *Whitehead & Company*, 222 U. S. 39, 40<sup>12-b</sup>; *Local Union No. 497 v. Joplin & P. Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Haynes v. Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.); See also *Shields v. Thomas*, 17 How. 3, 4. The value of these contracts is the amount involved. *Texas & Pac. Ry. v. Gentry*, 163 U. S. 353, 361.

Looking at the question of jurisdictional amount from the view-point of the value of a right which appellees seek to protect in this suit (*McNutt v. General Motors Corp.*, 298 U. S. 178, 181; *KVOS Inc. v. Associated Press*, 299 U. S. 269), it is manifest that such right vastly exceeds in value \$3,000.

The State Statute prevents the appellees from jointly doing business in the State of Florida. The income from this business in that State alone averages \$59,000 annually. Moreover, if appellees jointly do business in Florida, they incur penalties and criminal liability which conceivably may run to many hundreds of thousands of dollars.

It is idle under these circumstances to contend that the jurisdictional amount is not involved. Appellants attempt to escape the amount which is involved to the appellees jointly, by completely disregarding the fact that the Society is not a separate entity but a voluntary association of members who are acting jointly and in concert to protect their copyrights and realize the pecuniary benefits that the Copyright Act seeks to give them. Appellants' argument proceeds on the theory that the Society is exactly the same as

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<sup>12-b</sup>The rule is stated in that case as follows:

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

a corporation, which was the situation dealt with by this Court in *KVOS v. Associated Press, supra* (299 U. S. 269).

Appellants claim that under the *KVOS* case, *supra*, the joint claims of members of the Society must be disregarded. That case, however, bears no analogy to the case at bar. There, the Associated Press, a corporation, brought an action to restrain a radio broadcasting station from appropriating news gathered by the Associated Press or its members. The members of the Associated Press were owners of newspapers who divided among themselves the cost of the corporation's operations. The act complained of was the procuring of copies of papers published by three members and broadcasting certain items published therein before the news reached the public. The bill of complaint contained the usual allegation that the amount involved exceeded \$3,000. This allegation however, was challenged, and as this Court held, the burden was then cast on the plaintiff to substantiate it. Plaintiff sought to discharge this burden by a reply affidavit to the effect that the payments made by newspapers for the news sold to them by plaintiff in the territory served by Station *KVOS* was upwards of \$8,000. per month which was being imperilled by the defendant's acts, and that the plaintiff was in danger of losing "said membership and payments if defendants' practices in respect to pirating said news is not enjoined." This Court stated that the affidavit must be read in connection with the statement in the bill that plaintiff "made no profit from furnishing news to its members but equally divided the expense among them." This Court then went on to state (p. 278):

"The association cannot therefore lose the \$8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and as to any other damage they may suffer from petitioner's competition, the affiant is silent.

Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage *caused its members* by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the *asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal.*"

Previously the Court had said (p. 277) :

"The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. *No facts are pleaded which tend to show the value of that right.*"

Obviously therefore, there is no such similarity between the case at Bar and the Associated Press case as would justify the dismissal of the bill of complaint in the former on the authority of the latter.

The appellee Society, on the *joint* behalf of *all* its members owns outright the performing rights in musical compositions (Exs. "B" and "C", R. 37, 41). It licenses these rights and collects moneys therefor. These moneys, as well as the rights belong to the members. Some of these moneys are never distributed but are set aside in a reserve fund (Articles of Association, Ex. "D", R. 44, 61) ; other moneys are set aside in a relief fund (Ex. "D", R. 61). In short, the Society on behalf of its members has a definite property right which has been and will be injured by the State Statute. The allegations of the bill and the supporting affidavits show that this right and the damage to it has a reasonable, definite and certain value greatly in excess of \$3,000, to



say nothing of the penalties which the Statute imposes if the Society or the members jointly attempt to exercise the rights which the Copyright Laws give them.

The Society *must* give up all its existing contracts with licensees in the State of Florida because those contracts are expressly invalidated and enforcement or attempted enforcement thereof is made unlawful. Since the Society is outlawed, it necessarily loses all its rights and becomes subject to all the penalties provided in the Statute. If these penalties are assessed, they will be collectible from the joint moneys received by the Society from its operations in other states and will be paid by all the members jointly. If the Society is dissolved in an action in Florida, such dissolution will destroy the joint rights of all its members throughout the country.

Since the motion to dismiss (R. 205) is deemed to admit all the allegations of the complaint and since the affidavits in *opposition* to the motion for interlocutory injunction do not dispute the allegations relating to the jurisdictional amount, those allegations must be deemed admitted. *Polk Co. v. Glover*, 83 L. Ed. 73 (November 7, 1938).

*McNutt v. General Motors, supra* (298 U. S. 178), upon which appellees rely, presents an entirely different set of facts. There, an Indiana law fixed certain maximum finance charges on the business of automobile financing. The complaint failed to make any allegations as to the amount in dispute other than giving the *net worth* of plaintiff's business; the value of the contracts purchased by it during certain periods of time, the number of persons with whom plaintiff dealt, the annual rental paid by plaintiff in Indiana, the number of employees and the aggregate amount of their salaries. *Not a word appeared in the complaint as to the damage that would be sustained by plaintiff as a result of non-compliance with the statute.* The plaintiff in that case assumed that the amount in controversy was the value of its business, *but there was nothing in the statute that put*

*the plaintiff out of business. For ought that appeared in the complaint in that case the statute could be complied with either at no cost at all to the plaintiff, or at a cost not in excess of \$3,000. Under those circumstances, this Court in holding that there was no showing of the requisite jurisdictional amount, said at page 181:*

*" \* \* \* But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds \$3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."*

Referring now to the other cases relied upon by appellants, it will be found that none of them present a situation at all comparable to the case at Bar.

In *Wheless v. St. Louis*, 180 U. S. 379, ordinance directed the cost of certain improvements to be imposed upon several lots of ground adjoining the improvement. The

owners of the several lots joined in a single action challenging the validity of the ordinance. It was admitted that the various lots of land threatened with assessment were owned in *severalty*; that no one complainant was interested in the lot of any other; and that the assessment against no one lot would amount to \$2,000 (pp. 381-2). Under the circumstances, the court held that the necessary jurisdictional amount was not involved.

The *Wheless* case obviously is not in point because in the case at bar all the appellees do have an interest in the rights of the others which have been vested in the appellee Society, which in turn issues licenses on the joint behalf of all members and which license agreements are invalidated by this Statute.

*Dewar v. Brooks*, 16 F. Supp. 636 (D. C. Nev.), is likewise a case where the plaintiffs did *not* have a joint interest. There, each of the plaintiffs sought to be relieved of the payment of grazing fees, which in each case were less than the jurisdictional amount.

In *Buck v. Kloeppel*, 10 F. Supp. 345 (N. D. Fla.), Judge STRUM, who was one of the members of the Court below in the case at bar, held that four copyright owners who had assigned their performing rights to the Society could not join as plaintiffs in a suit for infringement against a single defendant infringing the works of all in a single evening's performance. A contrary conclusion was reached by the Circuit Court of Appeals for the Second Circuit in *Buck v. Elm Lodge, Inc.*, 83 F. (2d) 201 (C. C. A. 2). In the case at bar the action is not one for infringement of copyright but rather to redress an injury to the joint rights which the Society possesses on behalf of all its members.

In *Pope v. Blanton*, 10 F. Supp. 15, 18 (N. D. Fla.), the Florida State Constitution fixed the boundary along the Gulf coast at three leagues from the mainland. A Florida statute made it unlawful to use diving suits, helmets or other apparatus used by deep sea divers for the purpose of catch-

ing sponges from waters within the territorial limits of the State of Florida. Punishment for violation of the statute was a fine not exceeding \$500. or imprisonment not exceeding one year, or both. Fifty-nine owners and captains of sponge boats sued to enjoin enforcement of the statute at a distance beyond three miles from the shore of Taylor county. The complaint was dismissed on the ground that there was no allegation that plaintiffs were engaged in a joint enterprise, and that there was nothing to show the damage caused to each individual by reason of the statute (10 F. Supp. 15). Thereafter, the complaint was amended by alleging that the boats of each of the plaintiffs were worth in excess of \$3,000.; that the sales of all plaintiffs through the sponge exchange amounted to \$300,000. yearly; that the profits were distributed among them; that in excess of 50 per cent of the sponges were gathered from five to ten and one-half miles off the shore of Taylor county; that off the shore of that county sponges grew more rapidly and were more easily gathered than elsewhere, and that plaintiffs would be irreparably damaged unless defendants were restrained from enforcing the statute. Thereafter another motion to strike the bill was made.

The court pointed out that the bill failed to show the loss suffered by plaintiffs by reason of their inability to catch sponges within the distance of nine miles from shore (the original bill alleged that sponges were gathered at a distance of from seven to fifty miles from the mainland), and there was nothing to show how much more it would cost plaintiffs to gather sponges elsewhere.

The District Court refused an interlocutory injunction.

This Court modified the decree by dismissing the bill of complaint for lack of jurisdiction, on the authority of the *McNutt* case, *supra* and the *KVOS* case, *supra* (*Pope v. Blanton*, 299 U. S. 521). This Court did not attempt to point out how that case was governed by the cases cited.

We think it clear, however, that it must have ordered a dismissal of the bill because there was nothing in the bill or affidavits to show how much more it would cost plaintiffs to gather sponges elsewhere than within the territorial limits of Taylor County. It will be remembered that in the *McNutt* case this Court said (p. 181) that the value of the right sought to be protected "may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." We have already shown that the loss to appellees "which would follow the enforcement" of the State Statute is greatly in excess of \$3,000. and that their interests are joint.

The decision in *Buck v. Case*, 24 F. Supp. 541 (W. D. Wash.), is the subject of a separate appeal in this Court, which will be argued immediately following the argument of the case at bar. (October Term, 1938, No. 329).

(2) THE VALUE OF THE MATTER IN CONTROVERSY AS TO EACH INDIVIDUAL APPELLEE EXCEEDS THE VALUE OF \$3,000.

Irrespective of the damage which the State Statute will cause all the members of the Society jointly, it will be recalled that ten individuals are parties plaintiff (R. 1), and the bill and affidavits show that the enforcement of the State Statute will cause each of these individuals damage in excess of \$3,000., the amount of damage being given in each individual case, as will be presently shown.

(a) Any attempt on the part of the individual appellees to protect their rights in Florida against infringement will cost them each greatly in excess of \$10,000. for the employment of investigators, clerical help, accountants and lawyers (R. 18). The cost to each individual appellee establishing an agency to protect each of them would greatly exceed any revenue that they might respectively hope to



collect in the State of Florida (R. 24). The individual appellees have neither the resources, funds, organization nor ability to protect their copyrighted musical works against infringement, and if they are deprived of the right to combine they will have to surrender and forfeit the right of public performances for profit which is given to them under their respective copyrights (R. 17-18).

As previously shown, the members of the Society jointly receive an average income in Florida of \$59,000. If they are required to act separately, this income would therefore be entirely wiped out and a deficit would take its place. Appellees are, of course, entitled to the benefits which flow from their copyrights and they are entitled to protect those rights. As the cost of protection would exceed as to each \$10,000. and as the attempt to realize upon the copyrights when acting individually, would turn a present profit into a deficit, the loss which the enforcement of the Statute would cost each individual appellee, would be greatly in excess of \$3,000.

(b) If appellees fail to comply with the Statute they may suffer penalties amounting to \$10,000. for every violation of the Statute<sup>13</sup> in addition to being subject to the other penalties of the Statute, including a fine of \$100. a day for each day they fail to furnish incriminating testimony.

(c) Appellees will lose the amounts which they now receive from the Society since the Statute compels them

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<sup>13</sup>The State Statute makes appellees subject to a \$5,000 fine under Section 8, and to an additional \$5,000 fine under the State Monopoly Statute (Laws of Florida; 1915, Vol. I, 281; amended, Laws of Florida, 1925, Vol. I, 517), the penalties of which statute are made applicable under the provision for cumulative penalties in Section 13 of the State Statute.

to surrender their membership. The contracts of each do not expire until December 31, 1940 (R. 17-18). On the basis of past annual receipts in excess of \$50,000. each (R. 32), appellees Carl Fischer, Inc., G. Schirmer, Inc. and Irving Berlin, Inc. will each suffer a net loss in excess of \$150,000. Appellees Buck, Nevin, Taylor, Speaks, Hill, Sousa and Bartlett will each lose in excess of \$15,000., each having received in excess of \$5,000. from the Society annually in the past (R. 32-3).

There is no way of compensating for this loss, because as a practical matter the Statute makes it impossible for appellees either jointly or severally to secure any royalties from users in Florida who publicly perform for profit appellees' copyrighted musical compositions.

It seems clear that the facts showing the necessary jurisdictional amount are amply alleged as to each appellee individually, as well as jointly, in his capacity as a member of the Society. In any event it is sufficient if the necessary jurisdictional amount be shown as to any one appellee. *Grosjean v. American Press Co.*, 297 U. S. 233, 241-2.

**B. The State Statute denies to appellees equal protection of the laws and deprives them of privileges and rights secured by the Constitution of the United States; hence the Court below had jurisdiction of the cause regardless of the amount involved.**

Where a claim is made that a citizen is being deprived by the laws of a state of any rights or privilege secured by the Constitution of the United States, the Federal Courts have jurisdiction regardless of the value of the matter in controversy (Jud. Code, §24, subds. 1, 14, U. S. C. Tit. 28, §41, R. S. §§563, 629, amended, 36 Stat. 1091; 48 Stat. 775;

Act of Aug. 21, 1937, c. 726, §1, 50 Stat. 738, printed in margin).<sup>14</sup>

It is not entirely clear what the exact line of demarcation between subsection 1 and subsection 14 is. We think however, that it is that found by Judge LEARNED HAND, after a review of the authorities, in *Marcus Brown Holding Co. v. Pollak*, 272 Fed. 137, 140-141 (S. D. N. Y.). His

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<sup>14</sup>"SECTION 41. (*Judicial Code, section 24, amended.*) *Original jurisdiction.* The district courts shall have original jurisdiction as follows:

"(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. *The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. \* \* \**

(Paragraph 14 which follows is a "succeeding paragraph"):

"(14) *Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

view as we understand it is that the word "secured" is used in subsection 14 in the sense of "created" as distinguished from a right existing before the Constitution. If this view is correct, the provisions of subsection 14 are applicable to the case at Bar for the following reasons:

(a) The suit is based upon the abridgement or deprivation by the State Statute of rights given to appellees through their copyrights.

Copyrights are *new rights secured and created* by the Constitution and the Laws of the United States. *Wheaton v. Peters*, 8 Pet. 591, 661-5 (1834); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127 (1932).

The State Statute deprives appellees of the right to have and enjoy the exclusive rights under certain copyrights granted to them respectively under Article 1, Section 8 of the Constitution of the United States and the Copyright Act, and the right to exercise these rights freely in the State of Florida without abridgement or interference; it denies to them in the exercise of these rights the equal protection of the laws and grants special privileges to users of copyrighted music in the State of Florida at the expense and in disregard of appellees' rights as hereinafter set forth (R. 5-8, 17).

The State Statute on its face deprives appellees of the right to act collectively. Yet, the individual appellees have neither the resources, funds, organization nor ability to protect their respective copyrighted musical works against infringement by unauthorized public performances for profit within the State of Florida (R. 18). Thus as a practical matter the State Statute deprives them of the right to enjoy their property in their copyrights.

The complaint alleges (and it is not denied) that the State Statute makes further inroads on appellees' copyrights by preventing them from licensing the broadcasting of their compositions outside the State of Florida if such broadcast

may be heard within or transmitted by wire or otherwise to the State of Florida; by depriving appellees of the means of detecting infringements in the State of Florida; by depriving them of unrestricted access to the Federal Court for redress for infringement of their copyrights; by setting up a system of wholesale price-fixing of copyrights in destruction of *existing* copyrights and of rights to obtain the full benefits of the Copyright Act in securing *future* copyrights; by interfering with the publication of appellees' copyrighted compositions in compelling them to keep a record of all purchasers of copies or records thereof within the State of Florida, and imposing upon them the impossible task of determining whether public performances for profit were given or authorized by purchasers of the sheets of music or of phonograph or of other records thereof in the State of Florida, and whether such performances were made or authorized by persons who had purchased sheets of music or records without that State, or who had obtained so-called "professional" or complimentary copies thereof (R. 27-8).

It is further alleged and not denied that the State Statute was enacted as a pretext under which the State of Florida is attempting to usurp the power to enact copyright laws delegated by the Constitution solely to Congress, and that the State Statute under the guise of an exercise of the police power interferes with the copyrights of appellees; that in truth and in fact the State Statute was enacted not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of appellees and others similarly situated without being compensated therefor, and without danger of being compelled to pay damages for infringement as provided in the Copyright Act (R. 29).

The State Statute deprives appellees of the right to enter into voluntary contracts licensing the public performance



for profit of their copyrighted musical works and of the right to determine the conditions under which such works may be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof (R. 29).

(b) The prohibition of the Fourteenth Amendment against the denial of the equal protection of the laws has been held to come within subsection 14.

*Truax v. Raich*, *supra*, 239 U. S. 33, 39, aff'g 219 Fed. 273, 283, (D. C. Ariz.), invalidated a statute of Arizona which required employers of more than five workers to employ not less than 80 per cent qualified electors or native born citizens, violation of the statute being punishable by a fine of not less than \$100. and imprisonment for not less than thirty days. Plaintiff in that case was a native of Austria who was threatened with discharge because he was employed in a restaurant employing more than five persons. The complaint alleged that the statute violated plaintiff's rights under the Federal Constitution by denying equal protection of the laws. Plaintiff was not subject to the penalties of the statute, which were visited only upon employers. The lower court held that an allegation of a particular jurisdictional amount was not necessary because plaintiff was being deprived by the statute of a right secured under the Federal Constitution (p. 283). This Court affirmed without discussing the jurisdictional question, but by its affirmance of the injunction we think it must have approved the lower court's conclusion in this respect.

The State Statute denies equal protection of the laws because it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performances of musical works which are not copyrighted under the Laws of the United States but which are protected at common law; a great many forms of copyright and kinds of copyrighted works are presently and consistently dealt

in, licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which is affected by the State Statute (R. 28).

The penalties imposed on appellees by the State Statute result in denying them equal protection of the laws and in depriving them of the opportunity to exercise the privileges, rights and immunities of citizens of the United States in the State of Florida unless they give up certain rights granted to them by the Federal Constitution, to wit, certain exclusive rights granted to them by their copyrights, and unless they give up the right of free access to the Federal Courts to redress infringement of their respective copyrights. In other words, the enjoyment of one Federal right in the State of Florida is conditioned by the State Statute upon the surrender of another Federal right. Such a Statute is clearly invalid. *Paul v. Virginia*, 8 Wall. 168, 180; *Terral v. Burke Construction Co.*, 257 U. S. 529, 532; *Harrison v. St. Louis & San Francisco R. R.*, 232 U. S. 318, 328.

In singling out for the condemnation of the Statute one class of owners for intellectual property (namely owners of copyrighted musical compositions) and exempting all others engaged in exactly the same business, the Statute denies equal protection of the laws. *Conholly v. Union Sewer Pipe Co.*, 184 U. S. 540-562.

The sole object of the State Statute is to oppress and discriminate against these appellees in favor of their 367 licensees in the State of Florida. That this is in fact the purpose of the Statute is a proper subject of judicial inquiry for the purpose of showing a denial of equal protection. *Dobbins v. Los Angeles*, 195 U. S. 223, 240; *McFarland v. American Sugar Co.*, 241 U. S. 79, 86. The *McFarland* case, *supra*, is discussed below at page 46.

## II.

The Statute on its face is a clear violation of Article I, Section 8, clause 8 of the Constitution of the United States.

Article I, Section 8, Clause 8 of the Constitution provides that:

"The Congress shall have power: \* \* \* To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the *exclusive right* to their respective writings and discoveries."

Congress has defined such exclusive rights by granting to the owner of a copyright in a musical composition the exclusive right:

"(a) To print, reprint, publish, copy and vend the copyrighted work \* \* \*"

"(e) To perform the copyrighted work publicly for profit if it be a musical composition and \* \* \* to make \* \* \* any form of record in which the thought of an author may be recorded and from which it may be read or reproduced \* \* \*" (Act of Mar. 4, 1909, 17 U. S. C., §1).

The only limitation which the Copyright Act places upon the exclusive right to make a record is that under certain circumstances a manufacturer may make records of a copyrighted work without the consent of the author upon paying two cents for each record made, but the payment of this two cent royalty does not give the manufacturer the right of public performance for profit. The Copyright Act, Section 1(e), 2nd proviso, reads in part as follows:

\* \* \* whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: *And provided further*, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

"In case of the failure, of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount."

A purchaser of a phonograph record or electrical transcription may perform it privately, but may not perform it publicly for profit without the consent of the copyright owner. *Irving Berlin, Inc. v. Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz v. Buck*, 40 F. (2d) 501, cert. den. 282 U. S. 880.

The exclusive right of public performance for profit is retained by the copyright owner under section 41 of the Copyright Act notwithstanding a sale of copies of the copyrighted work.<sup>15</sup>

Appellees, upon securing their respective copyrights were granted *exclusive* rights which even the United States may not invade. *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189; *James v. Campbell*, 104 U. S. 356, 358; *United States v. Bell Telephone Co.*, 167 U. S. 224, 249-50.

*A fortiori*, the State of Florida may not invade these exclusive rights in the manner attempted by the State Statute.

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<sup>15</sup>Section 41 reads as follows (Copyright Office Bulletin No. 14, p. 22):

"SEC. 41. The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Purchase of the material object (*e. g.* engraved plates, books, sheets of music etc.) was held not to give any rights in the copyright in *Stephens v. Cady*, 14 How. 528 (1852); *Stevens v. Gladding*, 17 How. 447 (1854); *Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914, 921 (S. D. Ohio); *Harms v. Cohen*, 279 Fed. 276, 280 (E. D. Pa.).



Moreover, Congress has completely covered by legislation the field of copyright and asserted its authority thereover. Consequently, the several states have lost any right that they may have had to legislate in that field. This proposition is so well settled as to need no citation of authority. However, some of the cases of this Court are collected in a footnote.<sup>16</sup> Thus the attempt by the State of Florida, through the State Statute, to invade the copyright field and regulate, directly or indirectly, the rights of copyright owners, is nugatory and the Statute invalid. The State Statute purports to define and regulate radio broadcasting in the "public interest". But this Court has already held that that field has been covered by Congress. *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 283.

A copyright owner can rely only on the laws of the United States for his remedies. *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 367 (1908). All rights granted by Congress are exclusive. *Lithographic Co. v. Sarony*, 111 U. S. 53, 56, 59 (1884); *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 291 (1907); *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 188 (1909).

Among the exclusive rights granted to copyright owners is the right of public performances for profit which includes performances by live musicians in hotels, restaurants and night clubs (*Herbert v. Shanley*, 242 U. S. 591), performances by means of radio broadcasting or re-broadcasting (*Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191), and by means of a radio receiving set installed in each room of a hotel operated from a master-controlled set (*Society of European S. A. and C., Inc. v. New York Statler Hotel, Inc.*, 19 F. Supp. 1 [1937, S. D. N. Y.]).

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<sup>16</sup>*United States v. Hill*, 248 U. S. 420; *Napier v. Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57.

The State Statute deprives copyright owners of the right to license the re-broadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Federal Copyright Law and Federal Constitution.

It also deprives them of the right to license the public performances for profit of their copyrighted musical compositions apart from the sale of sheet music, or of records, or electrical transcriptions. It deprives them of the right to license their copyrighted works to different licensees in different States, because the State Statute provides that a license given to users outside the State confers a license upon users in the State of Florida with the separate consent of the copyright owner, and in fact, regardless of his consent.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners (*F. A. D. Andrea, Inc. v. Radio Corp. of America*, 88 F. (2d) 474 (C. C. A. 3), aff'g 14 F. Supp. 226, cert. den. 300 U. S. 681; *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp., 643 [D. C. R. I.]). The several States may not pass laws to the contrary (*Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914, 917 [S. D. Ohio]).

Yet the State Statute attempts to fix the terms and conditions upon which appellees may grant licenses under their copyrights.

## III.

**The Statute is invalid under the doctrine of *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, as an attempt to destroy appellees' property rights by legislative fiat.**

The attempt to destroy the Society by a *Statute* which declares that it shall be deemed to be in restraint of trade without giving the Society a right to show that it is not in restraint of trade is similar to the attempt of the State of Louisiana in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79 to legislate the American Sugar Company out of existence in that state. A statute there declared the business of refining sugar to be impressed with the public interest "by reason of the nature and by reason of the monopolization thereof", and on that footing certain regulations were made. It authorized an inspector to make reasonable regulations affecting any branch of sugar refining in the public interest and to prevent monopoly, and then provided that any person engaged in the business of refining sugar within Louisiana who systematically paid in Louisiana a less price for sugar than he paid in any other state "shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade." Drastic penalties followed, as in the case of the State Statute, leading ultimately to the appointment of a receiver. Failure to operate a plant for a period of one year or to sell it within six months thereafter also gave rise to the appointment of a receiver with a power to sell the plant within twelve months after appointment. The statute provided that an injunction could be issued or a receiver appointed after a hearing, subject to an appeal.

In that case the court pointed out that the following allegations of the bill "throw special light upon the case"

(p. 82): The plaintiff, American Sugar Company, built a new refinery in Louisiana and closed an old one in the State to save expense; it purchased less than one-half of Louisiana sugar crop, often paying lower prices in Louisiana than it would pay in New York. The answer alleged that plaintiff was a monopoly and combination in restraint of trade completely controlling the sugar trade in Louisiana; that suits had been brought against it by the United States and others under the Sherman Act. Other facts were alleged in the answer attempting to show that the plaintiff was in fact a monopoly. In affirming a decree granting an interlocutory injunction, this Court (per Mr. Justice HOLMES) said at p. 85:

"The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity, since it made the legislation necessary. If the connection were admitted it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights or prevent it from asserting them in the only practicable and adequate way.

"The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We

deem it sufficient to refer to those that were mentioned by the District Court; a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that *can have no foundation except the intent to destroy.*"

In commenting on the presumption making the Sugar Company guilty of being an unlawful monopoly, the Court said at page 86:

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R. v. Turnipseed*, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But *it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.* If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."



Applying that decision to the case at bar, the Society is made guilty of being a combination in restraint of trade because it constitutes a number of composers, authors and publishers who have assigned their performing rights to the Society, which in turn fixes the price of a license for the public performance for profit of the copyrighted musical compositions of the members of the Society. That activity is declared to be an unlawful combination in restraint of trade, regardless of whether or not it is in fact and in law such a combination.

The record shows, and there is no denial of the fact, that no payment whatsoever was made for the right to perform publicly for profit copyrighted musical compositions until the organization of the Society, and that there are no means for licensing these rights except through the Society; that it would be so costly and unwieldy to attempt to license these rights on a basis of individual bargaining as to each performance, that it would be impossible to license them as it was impossible before the Society was formed.

The draughtsmen of the Statute realized this impossibility and provided for it by a rather cunning device. The mere purchase of a sheet of music or the mere importation from another State of a record or of performers or of a radio broadcast was seized upon as a means of exempting Florida users from the duty to respect the exclusive rights of copyright owners, as applied to the right of public performance for profit. Such a thinly veiled invasion of property rights can hardly be countenanced. This is especially true where a State Statute under the guise of the public interest seeks to nullify, destroy and confiscate rights granted under the Federal Constitution and to invade a field particularly reserved to Congress.

## IV.

**The Society is not an unlawful combination in restraint of trade; but even if it were, the State of Florida may not deprive the members of the rights secured to them by their copyrights, and a Court of Equity may not deny them the means of protecting those rights.**

Appellants urge that appellees should be denied any relief because they allegedly come into Equity with unclean hands in that the Society is "a price-fixing combination operating in restraint of trade."

We have shown above the purpose for which the Society was formed. It was not to restrain trade in any sense of the word both because the rights of the Society are only to grant licenses for public performances and because the licenses are given equally to all persons applying for them upon reasonable terms.<sup>17</sup> A copyright gives to the proprietor thereof an exclusive right. All that the members of the Society have done is to vest in representatives of their choosing, the right to grant collective licenses under all of the copyrights of all of the members of the Society. The record is void of any suggestion of oppression or illegal use in combination of what the individual members of the Society

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<sup>17</sup>Appellants contend that the Society discriminates between newspaper-owned broadcasting stations and others, comparing the contract (R. 243) under which a station owned by a newspaper guarantees a minimum payment of \$2,000 (R. 246) with the payment of 3% of the gross amount received from the sale of broadcasting facilities in which music copyrighted or composed by members of the Society is rendered until the receipts reach a total of \$25,000 and 5% thereafter (R. 246)—with the contract by stations which are not newspaper-owned and which guarantee a minimum payment of only \$1,000 with percentage payments on receipts from the sale of all broadcasting facilities ranging from 3% to 5% of such receipts and permitting the broadcasting station to make a 15% reduction for advertising agency commissions (R. 71). These two types of contracts are the standard forms of contracts. They are entirely different. It cannot be said that either one discriminates against the other.

could have done separately. The purpose of the Society is to protect the copyrights and at the same time make it possible for those who wish to use for public performance for profit the musical compositions of the members, to do so by getting a blanket license on reasonable terms.

Users have consistently and uniformly objected to the separate licensing of individual compositions on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of all types of musical compositions that are pleasing and entertaining to the public (R., 18).

It is impossible for users to secure in advance the consent of all copyright owners whose works are performed in their places of public entertainment (R. 80). If not for the Society, all composers and authors would be compelled to forego all benefits from the public performance for profit of their copyrighted compositions by users of music.

It would be impossible to license single compositions, because the users do not keep any records of the compositions played by them (R. 114). The smaller broadcasting stations are opposed to such a system of individual licensing, because of the tremendous expense and hardship which would be imposed on them (R., 114). Broadcasting stations in Florida do not keep a record of all the musical compositions broadcast by them (R., 115).

Quite apart from these difficulties, there is no way of placing a value for royalty purposes upon the performing right of a single number or a group of numbers or even of the numbers of an entire catalogue of a particular music publisher (R. 115).

The remarks of Mr. Justice BRANDEIS in *Standard Oil Company v. United States*, 283 U. S. 163, 171 are appropriate here. He said (p. 171):

"An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. *If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition.*"

The Society makes it possible to license the public performance for profit of copyrighted musical compositions in a situation where such licensing would be otherwise impossible.

It has been held by many of the lower Courts and without exception as far as we know, that the fact that the owner of a patent, trademark or copyrights is a member of a combination prohibited by the Federal Anti-Trust Acts, does not deprive such owner of the privilege of protecting the rights given to him by the patent, trademark or copyright, as the case may be, in a court of equity or allow another to steal or pirate his property.<sup>18</sup>

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<sup>18</sup>*Cimiotti Unhairing Co. v. American Fur Co.*, 120 Fed. 672 (N. J.; reversed on other grounds, 123 Fed. 869, 198 U. S. 399); *Independent Baking Powder Co. v. Boorman*, 130 Fed. 726 (N. J.); *Motion Picture Patents Co. v. Eclair-Film Co.*, 208 Fed. 416 (N. J.); *Harms v. Cohen*, 279 Fed. 276, 280 (E. D. Penna.); *Witmark v. Pastime Co.*, 298 Fed. 470, 480 (S. C.; aff'd on opinion of D. C., 2 F. (2d) 1020); *Western Electric Co. v. Wallerstein*, 48 F. (2d) 268 (W. D. N. Y.); *Trico Products Co. v. E. A. Laboratories, Inc.*, 49 F. (2d) 404 (E. D. N. Y.); *Radio Corporation v. Majestic Distributors*, 53 F. (2d) 641 (Conn.); *Western Electric Co. v. Patent Corporation*, 53 F. (2d) 639 (S. D. N. Y.); *National Electric Co. v. Circle Flexible Co.*, 57 F. (2d) 219 (E. D. N. Y.); *Radio Corporation v. Duovac Radio Tube Corp.*, 6 Fed. Supp. 275 (E. D. N. Y.); *General Electric Co. v. Wise*, 119 Fed. 922; *General Electric Co. v. Minneapolis Electric Lamp Co.*, 10 F. (2d) 851; *Van Kannel Revolving Door Co. v. General Bronze Corp.*, 6 F. Supp. 518.

By a parity of reasoning, the owner of a copyright should not be denied the right to protect the copyright in a court of equity against invasion by a State Statute, especially when no other adequate remedy is available (see Finding 11, R. 281).

## V.

**The State Statute is not a valid exercise of the police power.**

Appellants attempt to justify the State Statute as a reasonable regulation affecting commercial dealings in copyrights, citing *Allen v. Riley*, 203 U. S. 347; *Patterson v. Kentucky*, 97 U. S. 501; *John Woods & Sons v. Carl*, 203 U. S. 358; *Ozan Lumber Co. v. Union County National Bank*, 207 U. S. 251; *Carbice Corporation v. American Patents Corp.*, 283 U. S. 27, 33; *Fox Film Corp. v. Doyal*, 286 U. S. 123.

We have already seen that this Statute was not enacted in the true public interest of the citizens of the State of Florida. The provisions of the Statute destroying the rights of copyright owners operating *individually* was certainly not necessary to accomplish the purpose of destroying any alleged *monopoly*. The provisions making the Society an unlawful combination in restraint of trade were not necessary if the Society really is a combination in restraint of trade, because earlier Florida Statutes which continue in effect, and the penalties of which are made cumulative, amply provide for the regulation and punishment of combinations in restraint of trade.

The regulations which were held reasonable in the cases relied on by appellants are of an entirely different scope.

In *Allen v. Riley*, *supra*, a Kansas Statute made it unlawful for any person to sell or barter any patented right



without first filing in the particular county a copy of the letters patent, stating under oath that they were genuine and that they had not been revoked or annulled, and that such person had full authority to sell or barter the same. It further required that any note taken in consideration of a patent right must recite "Given for a patent right". These statutes were passed to meet a well-known evil. The Court pointed out that small expense was involved in complying with the statute, and that the statute was a reasonable means of meeting the evil of fraudulent sales of non-existent patents. In upholding the statute, this Court warned against such statutes as the one at bar, saying at page 355:

"To uphold this kind of a statute is *by no means to authorize any State to impose terms which, possibly, in the language of Mr. Justice Davis, in *Ex parte Robinson*, 2 Biss. 309, 'would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the Constitution.' Such a statute would not be a reasonable exercise of the powers of the State.*" (Italics ours.)

*Woods v. Carl*, *supra*, and *Ozan Lumber v. Union County*, *supra*, followed *Allen v. Riley*, *supra*, in interpreting a similar Arkansas Statute.

*Patterson v. Kentucky*, *supra*, involved a Kentucky statute which required the inspection of oils and other inflammable fluids used for illuminating purposes, and prohibited the sale for such purposes of any substances which could ignite at a certain temperature. The defendant, who was convicted of selling oil in violation of the statute, defended on the ground that his process was protected by letters patent. The statute was upheld as a reasonably necessary means of protecting the lives and health of the citizens of

Kentucky. As the Court pointed out, this was a mere police regulation "strictly and legitimately for police purposes", ~~which, said~~ at page 506 that "police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health and property, which each State owes to her citizens" must be upheld.

The State Statute was not enacted in good faith and has no appropriate or direct connection with the protection of the citizens of Florida, except to the extent that it immunizes 367 citizens of that State against enforcement of the Federal Copyright Act.

Appellants complain that the purpose of the Florida legislature in passing this Statute cannot be considered, citing *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126. In that case the court refused to "speculate as to the motives of the State" where there was nothing on the face of the statute or by its necessary operation to justify an assumption that the State has not acted in good faith.

In the case at bar, evidences of bad faith on the part of the legislators appear both on the face of the Statute and in its practical operation. Under the State Statute it is impossible for any owner of a copyrighted musical composition to enforce the payment of royalties by Florida users who profit from the public performance of such copyrighted works whether the copyright owners act as individuals or whether they act collectively. If the copyright owners act as *individuals*, they are barred from collecting license fees for the public performance for profit apart from the amount charged for the sale of sheet music, and they cannot collect royalties from Florida users who import their music from other States by contract with third parties who give such performances by means of records or other articles or devices serving to reproduce the copyrighted work mechanically. If the copyright owners act *collectively* and attempt to issue blanket licenses (which is the only

method evolved in any country for the licensing for the right of public performance), they necessarily run afoul of the Statute and are subject to its drastic penalties. If the purpose of this Statute were to regulate monopolies or combinations in restraint of trade, there would be no reason for limiting the rights of copyright owners who act as individuals. Those sections which curtail the rights of individual copyright owners, and which appellants would have the court ignore upon this appeal, show clearly that the Statute was not passed in the *bona fide* public interest of the State of Florida.

Since the Statute *on its face* shows an absence of good faith it is entirely proper to examine the circumstances surrounding passage of the Statute; and since the Statute was obviously passed for the benefit of a few users of music in the State of Florida, who secured passage of such Statute, that fact is relevant in passing upon the question of whether the Statute was enacted in the public interest.

*Carbice Corporation v. American Patents Development Corp.*, *supra*, merely cites the above cases in a footnote at page 33 for the proposition that the grant of a United States patent does not exempt the patented product from limitations imposed by said police power. This, of course, does not give the States the right to enact unconstitutional statutes by prefacing them with a statement that they are enacted in the public interest. In that footnote, Mr. Justice BRANDEIS also refers to the case of *Webber v. Virginia*, 103 U. S. 344, where it is said at page 347:

"It is only the right to the invention or discovery—the incorporeal right—which the State cannot interfere with."

The statute in *Webber v. Virginia* was held to discriminate against non-resident owners of patents and was invalidated on that ground. Referring to those subjects which

come under the powers reserved to Congress, this Court there said at page 351:

"Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe."

If each State were free to make its own regulations on the subject of copyrights like that of the State of Washington considered on the appeal to this Court in *Buck v. Gallagher* (October Term, 1938, No. 329) (some States enacting statutes like the State Statute and others conceiving some other form of regulating copyrights), the constitutional provision reserving to Congress the power to secure to authors and inventors the exclusive rights in their respective writings and discoveries for limited periods of time would be completely nullified.

*Fox Film v. Doyal*, *supra*, points out one feature of a copyright that the State Statute completely ignores. This Court there said (286 U. S. 123, 127):

"The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."

Under the State Statute the right to exclude others from using a copyright in public performances for profit is confiscated if the copyright owner chooses to exercise one of the rights under a copyright, namely, the right to sell copies. This Court also pointed out in the *Fox Film* case that a tax on copyright royalties must be non-discriminatory and must not hamper the execution of the policy of the copyright statute (p. 131).

The State Statute not only discriminates against copyrights, but makes the enjoyment of certain rights therein impossible, and as to those rights confiscation results.

## VI.

**The State Statute impairs obligations under existing contracts.**

Section 3 of the State Statute provides that "All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforcible in any Court within this State." The collection or attempted collection of moneys, thereunder is made illegal and subjects the combination, its agents, members or representatives seeking to enforce the same to the penalties of the Statute.

Thus the State Statute destroys all of the 367 contracts now existing between the appellee Society (representing all its composer, author and publisher members jointly) and users located in the State of Florida.

The contracts between the Society and users in Florida and between the Society and its members were valid when made and cannot now be declared illegal; nor can the obligations thereunder be altered by legislative fiat.

The Constitution of the United States provides (Art. I, §10):

"No State shall \* \* \* pass any \* \* \* Law impairing the Obligation of Contracts \* \* \*."

It is obvious that the purpose of destroying existing contracts is to benefit the other parties to those contracts at appellees' expense. There is no public interest or public necessity involved.

In *Worthen Co. v. Kavanaugh*, 295 U. S. 56 (1935), this Court invalidated an Arkansas statute which impaired the security of bondholders under the guise of "public interest." This Court there said at p. 62:



*"What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."*

## VII.

**The State Statute interferes with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.**

Section 8 of the Copyright Act provides as follows as to recognition of copyrights in works of citizens and subjects of foreign States:

"(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

Pursuant to this provision a number of treaties have been entered into between the United States and foreign countries and there have been 62 Presidential proclamations establishing reciprocity between the United States and foreign countries. (See Copyright Office Bull. #14, pp. 39-40A).

Such reciprocity has been established on the basis of copyright laws as enacted by Congress. If each of the States may modify those laws the basis upon which these treaties have been entered into and the proclamations issued will be entirely destroyed.

The Society has reciprocal agreements with similar societies existing in practically every civilized foreign country of the world. These agreements are made pursuant to the treaties and proclamations mentioned above. Since the State Statute nullifies these contracts it interferes with rights protected by treaties which are the supreme law of the land.

The Society is entitled to assert in this action the rights of foreign societies under treaties and proclamations, since the interference with those treaties and proclamations by this Statute will injure appellees' contractual relations with the nationals of foreign countries.

In this respect the case at bar is similar to *Pierce v. Society of Sisters*, 268 U. S. 510, 535-6, where this Court held that the owners of schools could protect their business enterprises by injunction against interference with the constitutional rights of parents of children who were their patrons and customers.

## VIII.

**The suit is not premature.**

Appellants contend that as to Sections 7-A, 11-A and 11-B, this suit is premature (Appls.' br. 62-5).

These Sections subject appellees to the jurisdiction of the Florida State Courts through fictitious definitions of "doing business" and of an "agent" authorized to accept service (Sec. 7-A); enforce penalties of \$100 a day for failure to furnish incriminating evidence in any suit brought against them by service of process in the manner described in Section 7-A, or otherwise (Secs. 11-A and 11-B). These sections are merely steps in the statutory scheme to impose upon appellees such onerous burdens and such drastic penalties that they will not attempt to enforce their property rights and their rights to sue in the Federal Court in the State of Florida.

Appellants apparently concede that the threat of injury under the other Sections of the Statute is pressing and immediate. The injury under the three Sections mentioned above is likewise immediate. Unless appellants are enjoined from enforcing this Statute, appellees dare not do any of the acts condemned by the Statute because the penalties to be visited upon them will be not only the fines and imprisonments provided for in the Statute but also the penalty of \$100 a day for each day that they fail to furnish incriminating evidence under Sections 11-A and 11-B. Likewise, appellees will be subjected to a dissolution suit and other suits provided for in the Statute on service which may be immediately obtained in the jurisdiction in which they do not reside and are not in fact doing business. All these dangers are immediate and pressing. They dare not act presently in violation of the Statute because of these penalties, and the threat of the Statute is an injury to and an invasion of their property rights.

In *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), an action was brought to enjoin enforcement of a statute two years before its effective date. In affirming a decree granting an interlocutory injunction, this Court said at p. 536:

"The suits were not premature. The ~~injury~~ injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

This doctrine was reiterated in *Carter v. Carter Coal Co.*, 298 U. S. 238, 287-8.

## IX.

**The Statute must fall as a whole, and its separate sections cannot be separated.**

The scheme of the State Statute is to destroy the right of public performance for profit in the State of Florida, whether the right is licensed individually by the separate owners of the copyright or whether it is licensed collectively through the Society. Appellants seek to divorce the two groups of provisions on the theory that they will not enforce the Statute against individuals who sue in the Federal Courts for copyright infringement, but will enforce it if the Society should sue or attempt to sue in the Federal Courts or elsewhere. (See letter of Tyrus A. Norwood, Assistant Attorney General, dated March 7, 1938, Ex. "5" annexed to answer of appellees to Motion to Vacate Decree, p. 24.)

The right of public performance for profit of all members of the Society has been transferred to the Society for

a period expiring December 31, 1940. Under the circumstances, the sections barring the licensing of performing rights separate and apart from the sale of sheet music are presently applicable. Sales of sheet music are controlled by the members of the Society acting individually. The Society has nothing to do with such sales, nor has it anything to do with the manufacture or sale of records; but the Society owns the right of *public performance for profit*, and it is only that right which is affected by *all* the sections of the Statute. Consequently, the validity of every section of the Statute is before this Court.

Where it is probable that certain provisions of the Statute would not have been enacted but for other provisions which are held bad, all the provisions of the Statute must fall together. *Carter v. Carter Coal Co.*, 298 U. S. 238, 316; *Williams v. Standard Oil Co.*, 278 U. S. 235, 243.

To sustain some of these provisions while invalidating others would be to rewrite the Statute and give it an effect altogether different from that sought by the Statute when viewed as a whole. *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 362.

As this Court said in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 87: "the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."



## X.

**The Court below properly exercised its discretion in granting the interlocutory injunction.**

It is submitted that the Statute is invalid on its face as has already been shown. If this be true, the Court clearly acted within its proper discretion in granting an interlocutory injunction. Since there has been no abuse of discretion the decree below should be affirmed. *Corporation Commission v. Cary*, 296 U. S. 452, 458 (1935); *Alabama v. United States*, 279 U. S. 229 (1929); *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 50-51 (1923).

In *Oil Company v. Conway*, 279 U. S. 813 (at 815), this Court said:

“Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.”

Special findings 10 and 11 of the Court below (R. 280-281), bring this case directly within the rule just stated.

The granting of interlocutory injunctions restraining the enforcement of similar statutes enacted in Nebraska and Tennessee indicates that a proper exercise of discretion required the granting of an interlocutory injunction.

## XI.

**The findings of fact and conclusions of law comply with Equity Rule 70½.**

Appellants now criticize the sufficiency of the findings of fact. Their statement of points to be relied on criticize the findings only to the extent that they were not filed prior to or contemporaneously with the granting of the interlocutory injunction (R. 287). The sufficiency of the findings is not challenged in the statement of points relied on. Their sufficiency is challenged for the first time in Appellants' Brief on this appeal.

One of appellants' criticisms is that the findings are "merely a condensation of the bill of complaint" (Appls. br. p. 112). It is difficult to imagine a set of findings being anything other than a condensation of a bill of complaint where no answer has been interposed and where the allegations are not denied.

The undisputed facts support the findings of the court, and those findings are amply sufficient to sustain the decree.

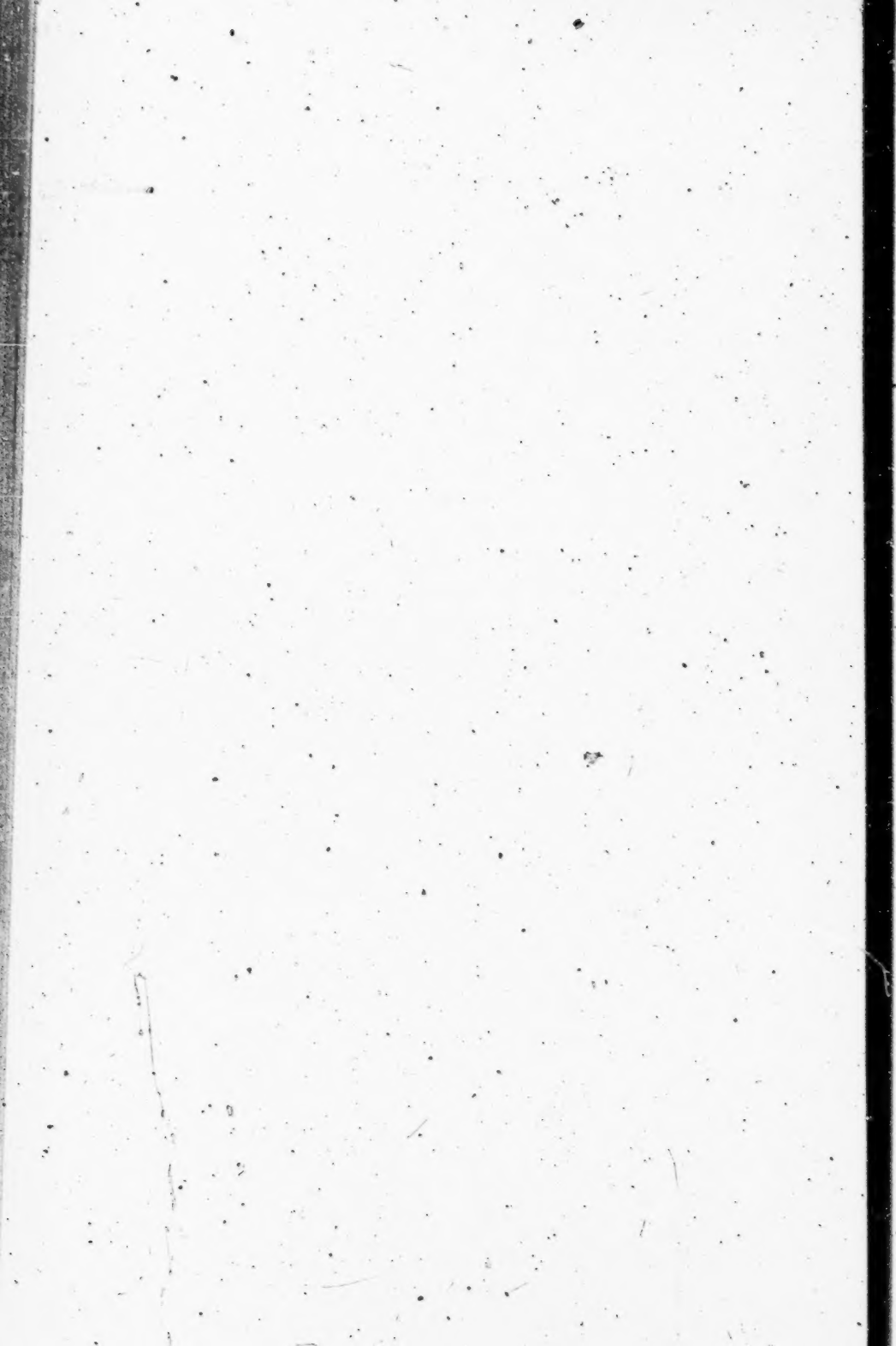
In *Interstate Circuit, Inc. v. United States*, 304 U. S. 55, relied on by appellants, there were no findings whatsoever.

In the case at bar the findings fully comply with the provisions of Equity Rule 70½.

## CONCLUSION.

**The decree appealed from should be affirmed.**

THOMAS G. HAIGHT,  
FRANK J. WIDEMAN,  
LOUIS D. FROHLICH,  
HERMAN FINKELSTEIN,  
MANLEY P. CALDWELL,  
*Counsel for Appellees.*



# SUPREME COURT OF THE UNITED STATES.

No. 276.—OCTOBER TERM, 1938.

George Cooper Gibbs, Individually  
and as Attorney General of the State  
of Florida, et al., Appellants,  
vs.

Gene Buck, Individually and as Presi-  
dent of the American Society of  
Composers, Authors and Publishers,  
et al.

On Appeal from the Dis-  
trict Court of the United  
States for the Northern  
District of Florida.

[April 17, 1939.]

Mr. Justice BREED delivered the opinion of the Court.

This is an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion for failure to set out facts sufficient to show Federal or equity jurisdiction, or to constitute a cause of action, and granting an interlocutory injunction against the enforcement of a Florida statute aimed at combinations fixing the price for the privilege of rendering privately or publicly for profit copyrighted musical compositions. Sec. 266, Jud. Code.

The appellant, the state Attorney General and various State Attorneys, are officers of the State of Florida charged with the enforcement of the act. The appellees, complainants below, are the American Society of Composers, Authors and Publishers, an unincorporated association organized under the laws of the State of New York; Gene Buck as president of the Society; various corporations publishing musical compositions; a number of authors and composers of copyrighted music; and several next of kin of deceased composers and authors. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest.<sup>1</sup>

One of the rights given by the Copyright Act is the exclusive right to perform copyrighted musical compositions in public for

<sup>1</sup>Equity Rule 38.

profit.<sup>2</sup> The bill of complaint alleges that users of musical compositions had refused to recognize this statutory right and to pay royalties for public performances for profit, and that authors, composers and publishers were unable, individually, to enforce their exclusive right because of the expense of detecting and suing for infringement throughout the United States. The Society was founded in 1914 to license performance of copyrighted music for profit and otherwise protect the copyrights. The state statute was directed at organizations like the Society and became effective on June 9, 1937.<sup>3</sup> So far as is important here, the statute makes it unlawful for owners of copyrighted musical compositions to combine into any corporation, association or other entity to fix license fees "for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit," when the members of the combination constitute "a substantial number of the persons, firms or corporations within the United States" owning musical copyrights. It declares the combination an unlawful monopoly, the price-fixing in restraint of trade, and the collection of license fees and all contracts by the combination illegal.

The bill attacked the statute as contrary to the Constitution and laws of the United States and the constitution of Florida. More specifically, it urged that the law impinged upon rights given by the Copyright Act of 1909, deprived complainants of rights without due process of law and without the equal protection of the laws, impaired the obligation of contracts already executed, and operated as an ex post facto law.

There was a formal allegation that the matter in controversy exceeded \$3,000, exclusive of interest and costs. In addition, the bill alleged that the three publishers owned copyrights of a value in excess of \$1,000,000 while each of the individual complainants owned copyrights worth in excess of \$100,000; that it would cost each individual more than \$10,000 to create an agency in Florida to protect himself against infringement by unauthorized public performances for profit, to issue licenses and to check on the accuracy of uses reported; that fees collected in 1936 in Florida amounted to \$59,306.81 and that similar sums were expected in the

<sup>2</sup> Act of March 4, 1909, Sec. 1(e); c. 320, 35 Stat. 1075, 17 U. S. C. Sec. 1(e).

<sup>3</sup> Fla. Gen. Laws 1937, Vol. I, c. 17807.



future; and that in 1936 each of the three publishers received more than \$50,000 from the Society and each individual more than \$5,000.

A motion for a temporary injunction was made on February 7, 1938, the same day the bill was filed. Voluminous affidavits were presented in support of the motion. They tend to substantiate the allegations of the complaint on the value of the copyrights and the income from the Society. Each publisher deposed that it had received more than \$50,000 from the Society in 1936, that its contract with the Society had a value in excess of \$200,000, and that to fix prices on each composition for each use in Florida would require an expenditure of more than \$25,000. The affidavits of the individuals showed annual incomes to them from the Society of from \$3,000 to \$9,000; contracts with the Society which the affiants valued in the thousands of dollars and an expense, in one instance, as high as \$5,000 to comply with the requirements of the Florida statute.

On March 3, 1938, the appellants moved to dismiss on several grounds: (1) absence of jurisdictional amount; (2) failure to state a cause of action; (3) want of equity and other objections not strongly pressed at this time.

The district court granted an interlocutory injunction and denied the motion to dismiss the bill. It thought that great damage would result unless the injunction issued and that there was grave doubt of the constitutionality of the act. Its findings of fact and conclusions of law were filed about a month and a half after the per curiam decision. It found that "the matter in controversy exceeds \$3,000 exclusive of interest and costs."

*Federal Jurisdiction.*—The issue was raised in the lower court by a motion to dismiss on the ground that it affirmatively appears "from the allegations of the bill . . . that the jurisdictional amount of \$3,000.00 . . . is not involved . . . in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers . . . and it does not affirmatively appear that the loss of any member of said society due to the enforcement of [the challenged act] would amount to the . . . necessary jurisdictional amount." Other jurisdictional averments of the motion state that the Society cannot suffer any loss from the legislation because it affirmatively appears that the Society divides all its proceeds from licensing between its members and affiliates and "therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on

the members of the Society, and not on the Society itself." Finally the motion sets out the lack of jurisdiction because it affirmatively appears from the allegations of the bill that the jurisdictional amount is not involved "because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would make by the non-enforcement of said law." As the form of the motion on the jurisdiction admitted the bill's statements, it was submitted on the allegations without the production of any evidence.

This method of testing the jurisdiction properly raises the question. No issue is made as to the standing of the Society or its members to sue. The basis of the attack is that there is a lack of the essential allegations as to the value of the matter in controversy. As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court. Both complainants and defendants were content to rest upon the bill and motion.

The bill alleges that the value of the matter in dispute exceeds the jurisdictional amount. Such a general allegation when not traversed is sufficient, unless it is qualified by others which so detract from it that the court must dismiss *sua sponte* or on defendants' motion.<sup>4</sup> In this instance, the allegation is, in effect, traversed by the language of the motion which asserts that no plaintiff has shown loss from enforcement equal to the jurisdictional amount. No other allegations are denied. By this method of attack the facts set out in the bill are left unchallenged for the court to accept as true without further proof. The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants. If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.<sup>5</sup> In view of the unchallenged facts, federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jur-

<sup>4</sup> Wetmore v. Bymer, 169 U. S. 115, 120, 121; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184; KVOS, Inc. v. Associated Press, 299 U. S. 309, 378.

<sup>5</sup> KVOS, Inc. v. Associated Press, 299 U. S. 269, 277; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

<sup>6</sup> McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

additional amount,<sup>7</sup> or, if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.

This Society, an unincorporated association with a membership of more than a thousand of the leading authors, composers and publishers of music, has received by assignment and possesses, for a five-year period which covers the time here involved, the "exclusive right to publicly perform for profit" musical compositions owned by its members. Licenses are issued by the Society to users in Florida "for the public performance for profit" of these compositions. After payment of expenses and royalties for similar rights to foreign associates, and retention of certain reserves, the receipts from licenses are divided among the members in amounts and by classifications fixed by the articles of association and the Board of Directors. The Society undertakes to protect itself and its members from piracies of the rights assigned to it. The Society has, in the absence of the challenged legislation and without now giving consideration to other objections as to the legality of its organization, a right to license which may be injuriously affected by the Florida statute. Whether this right to license flows from its limited ownership of the copyrights or by authority of its members is immaterial here. We find it unnecessary to decide whether this unincorporated association has standing to sue and confine our decision to the amount in controversy between the members of the Society and the defendants. Members, both corporate copyright owners and individual composers of music and lyrics, are plaintiffs. They represent all other members. As the members own the copyrights, less the limited assignment to the Society of the right of public performance for profit, and share in the earnings through mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action.<sup>8</sup> These members

<sup>7</sup> *Gréjean v. American Press Co.*, 297 U. S. 233, 241-242. *Clark v. Paul Gray, Inc.*, No. 534, this Term, decided today.

<sup>8</sup> Article XV, section 1, of the articles of association, reads as follows: "Apportionment of Royalties—

"Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

"(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

"(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

"(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half ( $\frac{1}{2}$ ) thereof to be distributed among the 'Music Publisher' members, and one-half ( $\frac{1}{2}$ ) among the 'Composer and Author' members respectively."

are real parties in interest. Because of the interposition of the statute they cannot in combination license production and collect fees in Florida. Unless the relief sought, the invalidation of the statute, is obtained, the members cannot conduct their business through the medium of the Society. They have a common and undivided interest in the matter in controversy in this class suit.<sup>9</sup>

The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is interdicted by the Florida statute. It is not a question of taxation or regulation but prohibition. Under such circumstances, the issue on jurisdiction is the value of this right to conduct the business free of the prohibition of the statute.<sup>10</sup> To determine the value of this right the District Court had the admitted facts that more than three hundred contracts expiring in 1940 were in existence between the Society and the Florida users; that in 1936 alone almost sixty thousand dollars was collected from the users, and that similar sums were expected for the remainder of the term. While the net profits of the business in Florida is not shown, the business of the Society, as a whole, is profitable. The three publisher parties receive more than \$150,000 yearly and individuals more than \$5,000 per year each. The cost of compliance with its requirements is evidence also of the value of the right of freedom from the act.<sup>11</sup> The complainants, other than the Society, allege without traverse that the cost to each one of providing individually in Florida the services now provided by the Society for each member would exceed \$10,000. Whether this is annually, for the length of the agreement or for some other term is not shown. From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds \$3,000 in value is fully supported.

*McNutt v. General Motors Acceptance Corporation*<sup>12</sup> differs. There the State of Indiana had passed an act regulating, not

<sup>9</sup> Cf. *Troy Bank v. Whitehead & Co.*, 222 U. S. 39; *Shields v. Thomas*, 17 How. 31.

<sup>10</sup> *Scott v. Donald*, 165 U. S. 107, 114; cf. *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322, 334; *McNeil v. So. Ry. Co.*, 202 U. S. 543; *Bitterman v. Louisville & N. R. R.*, 207 U. S. 205; *Packard v. Banton*, 264 U. S. 140.

<sup>11</sup> *Packard v. Banton*, 264 U. S. 140; *Petroleum Exploration, Inc. v. Comm'n.*, 304 U. S. 209, 215; *Healy v. Ratta*, 292 U. S. 263; *Buck v. Gallagher*, No. 329, this Term, decided today.

<sup>12</sup> 298 U. S. 178.

prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *IVOS, Inc. v. Associated Press*,<sup>13</sup> relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was "the right to conduct those enterprises free of" interference. On the issue of the value of this right, it was deposed only that the Associated Press received more than \$8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a non-profit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments.

*Failure to State a Cause of Action.*—The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction, is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction.<sup>14</sup> Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below.<sup>15</sup> Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise "grave doubts of the constitutionality of the Act" in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. This bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for

<sup>13</sup> 299 U. S. 269.

<sup>14</sup> *Polk Company v. Glover*, 305 U. S. 5, 9.

<sup>15</sup> *O'Keefe v. New Orleans*, 273 F. 370; *Wright v. Barnard*, 233 F. 329; *Doherty v. McDowell*, 276 F. 728; *Ralston Steel Car Co. v. National Dump Car Co.*, 222 F. 590, 592. Compare *Kansas v. Colorado*, 185 U. S. 125, 144-145; *Wisconsin v. Illinois*, 270 U. S. 634. *Wilshire Oil Co. v. United States*, 295 U. S. 100, 102-103. 560



profit is prohibited by the statute; that existing contracts are impaired; property taken without compensation; recovery on extra state contracts denied and the equal protection and due process clauses of the 14th Amendment violated in manners specifically pleaded. Drastic penalties for violation of the act are provided.<sup>16</sup> The manner in and extent to which the challenged statute offends or complies with the applicable provisions of the Constitution will be clearer after final hearing and findings.<sup>17</sup> The findings here were on the motion for interlocutory injunction and on the issue of jurisdiction.

*Other Assignments.*—The other material assignments of error to the interlocutory order specified on the appeal are addressed (1) to the lack of equity in the bill, (2) to the exercise of discretion in ordering a temporary injunction; (3) to the lack of findings before the order of temporary injunction and (4) to the failure to strike from the bill allegations as to certain sections which deal with contract relations between the Society and users of the musical compositions because these sections are not enforced by the state officers. We treat of them briefly: (1) It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violation and the prohibition of the issue of licenses or collection of fees show the need to protect complainants.<sup>18</sup> (2) Upon the conclusion that the motion to dismiss should be overruled, there was no abuse of discretion in granting an interlocutory injunction.<sup>19</sup> The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer charged with supervision of enforcement,<sup>20</sup> of readiness and willingness "to prosecute any violations of said act," sufficiently establish the immediate danger

<sup>16</sup> Fine \$50 to \$5,000 and imprisonment one to ten years or either. Section 3, Fla. Gen. Laws, 1937, c. 17807.

<sup>17</sup> *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 211-213. *Polk Co. v. Glover*, 305 U. S. 5.

<sup>18</sup> *Ex parte Young*, 209 U. S. 123, 165; *Terrace v. Thompson*, 263 U. S. 197, 215.

<sup>19</sup> *Alabama v. United States*, 279 U. S. 229, 231; *Ohio Oil Co. v. Conway*, 279 U. S. 813.

<sup>20</sup> Sec. 10, Fla. Gen. Laws, 1937, c. 17807.

from enforcement.<sup>21</sup> No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court. Ordinarily it would be expected that where a temporary injunction is considered necessary to protect the rights of complainants against the allegedly unconstitutional action of state officers, under a statute, a final order would follow with all convenient speed. (3) The order of the trial court was entered April 5, 1938. The findings of fact and conclusions of law were not filed until May 17, 1938, after the first assignment of errors had pointed out the omission and after the appeal was allowed. The original assignment of error, which had relied upon the failure to comply with Equity Rule 70½ was amended to show subsequent compliance but no assignment of error was made on account of the fact that the findings were out of time. The objection was taken in the statement of points to be relied upon on the appeal and in appellants' brief in the specification of errors to be urged. Better practice dictates the filing of the finding of facts and conclusions of law before or contemporaneously with the order or decree. It would be useless, however, to reverse the order granting the temporary injunction and remand the cause. The temporary injunction would now be in order. (4) In answer to the fourth objection it may be said that the issue like that of constitutionality can be more satisfactorily disposed of upon final hearing.

*Affirmed.*

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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<sup>21</sup> Terrace v. Thompson, 263 U. S. 197, 214-16; Cline v. Frink Dairy Co., 274 U. S. 445, 451-52.



# SUPREME COURT OF THE UNITED STATES.

No. 276.—OCTOBER TERM, 1938.

George Cooper Gibbs, Individually  
and as Attorney General of the State  
of Florida, et al., Appellants,

vs.

Gene Buck, Individually and as Presi-  
dent of the American Society of  
Composers, Authors and Publishers,  
et al.

On Appeal from the Dis-  
trict Court of the United  
States for the Northern  
District of Florida.

[April 17, 1939.]

Mr. Justice BLACK, dissenting.

I believe the decree enjoining and suspending Florida's law prohibiting monopolistic price fixing should be reversed because

(1) No showing has been made that casts any doubt upon a State's power to prohibit monopolistic price fixing,

(2) Complainants (appellees here) failed to sustain their burden of showing \$3,000.00 in controversy, as required by statute.

(3) The court below failed to require a bond or other conditions adequate to protect the people in Florida who might be injured by the injunction.

*First.* Do general allegations of unconstitutionality,<sup>1</sup> similarly general affidavits and general findings by the trial court show that the Florida statute against monopolistic price fixing is "novel, if not unique"<sup>2</sup> State legislation, and raise such "grave constitutional questions" that a Federal court should suspend the statute to permit complainants to continue exacting monopoly tribute from the public until the court hears evidence?

The enjoined Attorney General and prosecuting attorneys of Florida do not have, and expressly disclaim any duty to enforce the statute against appellees unless they combine to fix monopolistic

<sup>1</sup> Cf. *Borden's Co. v. Baldwin*, 293 U. S. 194, 203; *Aetna Ins. Co. v. Hyde*, 275 U. S. 440, 447; *Public Service Commission v. Utilities Co.*, 289 U. S. 130, 136, 137.

<sup>2</sup> *Borden's Co. v. Baldwin*, *supra*, 203.

prices. Therefore, this injunction cannot rest upon the alleged unconstitutionality of any provisions of the statute other than those prohibiting monopolistic price fixing. And allegations of the bill attacking other provisions of the statute raise only moot questions. If this record can be said to raise any "grave", "novel", or "unique" question at all, that question is whether a State has power to prohibit price fixing by monopolies in restraint of trade.

If the issue is not narrowed to this single point, approval is given to the enjoining of State officials from action which they have no duty to perform and have solemnly disclaimed both here and in the District Court.<sup>3</sup> In the absence of an interpretation by the Florida Supreme Court, to what more authoritative source or evidence may a Federal court turn for the meaning of the statute, than to the decision of the highest State official charged with its enforcement? He has determined that, so far as he and the prosecuting attorneys under him are concerned, appellees may license their compositions as they please, may combine to detect and punish infringers and may operate in Florida at will, provided only that they abandon monopolistic price fixing. Even as to the statutory prohibition against price fixing, all that is before us, a practice more desirable and more in keeping with our dual form of government, previous decisions,<sup>4</sup> and the trend of Congressional legislation,<sup>5</sup> would be to refrain from Federal judicial interference until the State courts are presented with an opportunity to define the statutory duties of appellants. "And . . . the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."<sup>6</sup> Judicially restraining these Florida officials from action which they declare they cannot and will not take, denies to Florida the traditional respect that has been accorded State officials by this Court.<sup>7</sup>

Even according to the comparatively new judicial formula here applied, the only issue is whether "novel . . . unique" or

<sup>3</sup> Cf., *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 412.

<sup>4</sup> *Glierist v. Interborough Co.*, 279 U. S. 159, 207; *Fenner v. Boykin*, 271 U. S. 240, 243-4; cf., *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43; and see *Clark, Brandeis, JJ.*, dissenting, *Cincinnati v. Cincinnati and H. Traction Co.*, 245 U. S. 446, 461.

<sup>5</sup> 28 U. S. C. 41; c. 726, 50 Stat. 738, 48 Stat. 775, 47 Stat. 70, 43 Stat. 938, 36 Stat. 1162, amended 37 Stat. 1013.

<sup>6</sup> *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194.

<sup>7</sup> See *Spelman Motor Co. v. Dodge*, 295 U. S. 89, 96; *Cincinnati v. Cincinnati and H. Traction Co.*, *supra*, 454, 455; *Virginia v. West Virginia*, 231 U. S. 89, 91; cf. *Des Moines v. City Ry. Co.*, 214 U. S. 179, 184. This injunction makes



"grave constitutional questions" are raised by the charge that these state officials will perform their sole duty under the Florida statute of prosecuting appellees for violations of the prohibitions against monopolistic price fixing. Paraphrasing this formula, the question here actually becomes: When complainants charge in a Federal Court of Equity that a State has passed, and its officers are about to enforce, a law against monopolistic price fixing, is there so much doubt about the power of the State to prohibit monopolistic price fixing that operation of the law must be enjoined and effect denied to it until evidence is heard by the Court?

Here, both the very bill upon which the injunction now approved was granted and affidavits of record establish beyond dispute appellees' flagrant violation of the Florida law by combining to fix prices. This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination. And these fees are not the same for like purchasers even in the same locality. Evidence shows that competing radio stations in the same city, operating on the same power and serving the same audience, are charged widely variant fees for identical performance rights, not because of competition, but by the exercise of monopoly power. Since it appears that music is an essential part of public entertainment for profit, radio stations or other businesses arbitrarily compelled to pay discriminatory fees are faced with price fixing practices that could destroy them, because the Society has a monopoly of practically all—if not completely all—available music. When consideration is also given to the fact that an arbitrarily fixed lower rate is granted to a favored station itself controlled by another instrument of pub-

strikingly pertinent the question of Justice Harlan, dissenting, in *Ex parte Young*, 209 U. S. 123, 179 (1908): "If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be as amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act . . . ?" His apprehensive prophecy has more than come true in the present case.

lic communication—a newspaper—the ultimate possibilities for control of the channels of public communication and information are apparent.

We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy. Should a Court of Equity grant this combination the privilege of violating a State anti-monopoly law? Does a State law prohibiting such a combination present "grave constitutional questions"?

It is my position that a State law prohibiting monopolistic price fixing in restraint of trade is not "novel" and "unique" and raises no "grave constitutional questions." The constitutional right of the States to pass laws against monopolies should now be beyond possibility of controversy. "That state legislatures have the right . . . to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question",<sup>8</sup> and few have challenged the power of State legislatures to ordain that "competition not combination, should be the law of trade."<sup>10</sup> Surely, there is presently no basis to doubt this power and to assert that its exercise raises "grave constitutional questions." As recently as 1937, this Court held that Porto Rico, with legislative powers not equal to, but "nearly as extensive as those exercised by any State legislature," could prohibit monopolistic price fixing as one of the "rightful subjects of legislation" upon which legislatures act.<sup>11</sup>

If the States have somehow lost their historic power to prohibit monopolistic price fixing combinations before presentation of evi-

<sup>8</sup> Cf., *Cont'l Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227, 262, affirming 148 Fed. 939; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 412. *M'Connell v. Camors-M'Connell Co.*, 152 Fed. 321; *Pacific Postal Telegraph Cable Co. v. Western Union Tel. Co.*, 50 Fed. 493; *American Biscuit & Manuf'g Co. v. Klotz*, 44 Fed. 721; 1 *Pom. Equity Juris.* (3rd Ed.) § 402.

<sup>9</sup> *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 107. "There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing [statutes which secure competition and preclude combinations which tend to defeat it] . . . To so decide would be stepping backwards." *International Harvester Co. v. Missouri*, 234 U. S. 199, 209. See, *Atl. & Pac. Tea Co. v. Grosjean*, 301 U. S. 412, 425-6; *Nebbia v. New York*, 291 U. S. 502, 529; *Rast v. Van Deman & Lewis*, 240 U. S. 342, 366-7.

<sup>10</sup> *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129; *Carroll v. Greenwich Ins. Co.*, *supra*, 411.

<sup>11</sup> *Puerto Rico v. Shell Co.*, 302 U. S. 253, 260, 261.

dence to a Federal court, at what point in our history and in what manner did they lose it? The people have not exercised their exclusive authority, by Constitutional amendment, to strip the States of their power over price fixing combinations and thus raise monopoly above the traditional power of legislative bodies.

It was expressly conceded at the bar that Florida had the Constitutional power to prohibit price fixing combinations unless the copyright laws limited this power. And, since argument of the present case, a decision rendered by us February 13, this year, made clear the principle that the copyright laws grant no immunity to copyright owners from statutes prohibiting monopolistic practices and agreements. We there declared that "An agreement illegal [by statute] because it suppresses competition is not any less so because the competitive article is copyrighted."<sup>12</sup>

"Due process" has been judicially endowed with great elasticity in relation to property rights, but it is inconceivable that it would afford refuge for monopolies deemed undesirable by the people's representatives. When a legislature as a matter of public policy determines to prohibit monopolistic combinations, we cannot, under any doctrine of "due process", rightfully "review their economics or their facts."<sup>13</sup> And, although "due process" is invoked, can evidence either add to or take from legislative power to permit, regulate or prohibit monopolies in the public interest?

Several of the general allegations in the bill are relied upon to justify suspension of the Florida statute until evidence is heard by a court. It is said the court should hear evidence because the "bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute . . . ." But what evidence can the court hear that will assist it in comparing the statute with the copyright laws? The Florida statute does not even purport to prohibit the "performance of compositions for profit," and the enjoined officials have neither threatened, nor do they intend, to prohibit such performance. It is said the bill alleges "that existing contracts are impaired" by the statute. But no contracts can be affected unless involving prohibited monopolistic price fixing. That the Florida law prohibits the continuation and execution of monopoly

<sup>12</sup> Interstate Circuit, Inc., v. United States, — U. S. —, p. —.

<sup>13</sup> Central Lumber Co. v. So. Dak., 226 U. S. 157, 161.

practices in pursuance of price fixing agreements made before the law was passed, can be no basis for constitutional objection.<sup>14</sup>

It is said the bill alleges "property taken without compensation." If the statute, of itself, takes property, (and no charge of unconstitutional application of the statute is made) is evidence required to show the manner of the taking? It is said the bill alleges that the statute violates "equal protection." But the sole thing threatened is prosecution of an admitted price fixing combination—comprised of practically all the musical copyright owners and publishers in the nation. " . . . if an evil [of monopoly] is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."<sup>15</sup> It is said a drastic penalty is provided for practicing price fixing. What evidence will serve to enlighten the Court on the statutory penalty? That penalty is set out clearly in the statute. If it invalidates the statute, that determination should be made now.

The present case illustrates how the recently fashioned judicial formula under which State laws must be enjoined if "grave constitutional questions" are presented in a complaint, actually results in an automatic judicial suspension of State statutes upon any general complaint to a Federal court. The apparently inevitable operation of this formula runs counter to the Tenth Amendment intended to preserve the control of the States over their own local legislation, and opens the door to further evasions of the Eleventh Amendment protecting the States from suits in Federal courts.<sup>16</sup> A lower Federal court's refusal in its "discretion" to suspend a State statute was recently reversed because "grave constitutional questions"—requiring evidence—were deemed raised by charges that the statute by requiring citrus fruit cans to be truthfully labeled

<sup>14</sup> *Waters-Pierce Oil Co. v. Texas* (No. 1), *supra*, 108.

<sup>15</sup> *Carroll v. Greenwich Ins. Co.*, *supra*, 411; *Central Lumber Co. v. So. Dak.*, *supra*, 160. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." *United States v. Carolene Products Co.*, 304 U. S. 144, 151.

<sup>16</sup> Cf. *Ex parte Young*, 209 U. S. 123, Harlan, J. dissenting, 168-204; and see *Pitts v. McGhee*, 172, U. S. 516, 528, 530; *In re Ayers*, 123 U. S. 443, 496, 497, 505.

violated the Constitution.<sup>17</sup> And here, where the District Court enjoined a State law in its "discretion", the injunction is sustained by a holding that evidence should be heard because "grave constitutional questions" are involved. However the lower court's "discretion" may be exercised, the formula apparently achieves but one result—State statutes are suspended.

Careful scrutiny of appellees' bill for injunction reveals no allegations indicating that Florida's power to prohibit monopolistic price fixing would, even under the formula applied, be altered by proof of any "particular economic facts . . . which are . . . properly the subject of evidence and of findings."<sup>18</sup> True, the bill alleges that the statute of Florida and similar legislation enacted by other States were "sponsored by an organized group . . . for their own selfish aggrandizement . . . without an adequate hearing being afforded to complaints and others similarly situated," and that "in truth and in fact, [the statute] was enacted not in the public interest . . . ." Appellees also allege that "unless the enforcement of this State statute is restrained . . . other States, in addition to Florida, Montana, Washington, Nebraska and Tennessee, may enact similar statutes . . . all of which would work undue hardship on complainants and would violate the spirit of the Constitution . . . ." These are some of the strongest—if not the strongest—of the bill's allegations deemed to raise "grave constitutional questions." Is the temporary injunction approved so that the Federal court in Florida may hear evidence on what constitutes the public interest of Florida? Shall the court hear evidence to determine whether or not "unless the enforcement of this statute is restrained" other States, "in addition to Florida", may similarly prohibit appellees' monopoly?

It is difficult to perceive how in the future—under this formula—any State law, directly or indirectly affecting property, can become effective until injunction proceedings have dragged their weary way through Federal courts. All State statutes might hereafter well substitute for the expression "to take effect within" a certain period of time, the words "to take effect after the Federal courts have heard evidence to determine" their reasonableness (wisdom). And the formula likewise fits Congressional enact-

<sup>17</sup> The *Pack Co. v. Glover*, — U. S. —

<sup>18</sup> *Borden's Co. v. Baldwin*, *supra*, at 210.



ments. Had the pronouncement of this formula not been the culmination of gradual judicial advances, it would have been everywhere recognized as a revolutionary departure from our constitutional form of government, under which the wisdom of legislation, within the field of legislative action, was left to the judgment of elected representatives of the people.

Florida can find little comfort in the admonition that "Ordinarily it would be expected that where a temporary injunction is considered necessary . . . a final order would follow with all convenient speed." This law has now already been suspended for a year, and experience demonstrates that injunctive suspension of State laws and State action can hang in the courts for many years before receiving final disposition.<sup>19</sup>

#### *Second. Jurisdictional Amount.*

These eleven appellees alleged in their bill for injunction that they sued on behalf of themselves and the more than 1,000 other (American) members of the Society. No determination is made here "that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount"—\$3,000. However, while appellees are not aided in establishing the jurisdictional amount by the "allegation that [they] . . . sued on behalf of others similarly situated,"<sup>20</sup> the Court nevertheless holds that the jurisdictional amount is in controversy in "the value of the aggregate rights of all members" (including the more than 1,000 who have not appeared in person) to combine and fix prices in Florida.

"Assuming that such a case as this will be called a class action, and . . . could be maintained as such . . . yet that it may be properly a class action does not affect the rule against aggregation [of claims for making up the jurisdictional amount], because [such aggregation] . . . is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein."<sup>21</sup> Appellees assert no common and undivided rights in any fund<sup>22</sup> or property;<sup>23</sup> "the amount payable to each by the

<sup>19</sup> See dissent, *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 35, and note.

<sup>20</sup> *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 86.

<sup>21</sup> *Eberhard v. North Western Mut. Life Ins. Co.*, 241 Fed. 353, 356, referred to with apparent approval in *Lion Bonding Co. v. Karatz*, *supra*.

<sup>22</sup> *Smith v. Swormstedt*, 16 How. 288.

<sup>23</sup> *Beatty and Ritchie v. Kurtz*, 2 Pet. 566.

Society depends upon his contract alone."<sup>24</sup> Neither does appellees' bill seek, as would the traditional class or representative bill in equity, to protect group rights all claimed under and traceable to a single decree,<sup>25</sup> or rights "which . . . [no one plaintiff] can enforce in the absence of the" others because derived from a single security instrument.<sup>26</sup> In this proceeding, all that members of the Society have in common is their alleged right to violate with impunity the Florida statute against price fixing. Unless opposition to and violation of the statute can be their bond of unity, appellees have "separate and distinct demands . . . [united] for convenience and economy in a single suit, [and] it is essential that the demand of each be of the requisite jurisdictional amount."<sup>27</sup>

Permissible joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court. Rule 38, under which this class or representative suit was brought, did not, in fact could not, extend that jurisdiction which depends solely upon Acts of Congress.<sup>28</sup>

A common desire to disregard a State law cannot serve as a common and undivided interest for purposes of Federal jurisdiction;<sup>29</sup> otherwise, all who oppose such a law can aggregate the values of their alleged individual rights so to disregard the law, in order that they may escape the courts of a State and bring its law before a Federal court. And the fact that a State law inflicts pecuniary loss upon members of a non-profit association because of their membership does not permit aggregation of the members' pecuniary interests as a basis for attack upon the law in a Federal court by some members "on behalf and with the authority of all."<sup>30</sup> Here, the individual members have made no showing of what they as in-

<sup>24</sup> Eberhard case, *supra*, 356.

<sup>25</sup> *Shield v. Thomas*, 17 How. 3, but see *Chapman v. Handley*, 151 U. S. 443.

<sup>26</sup> *Troy Bank v. Whitehead & Co.*, 222 U. S. 39, 41.

<sup>27</sup> *Id.* 40.

<sup>28</sup> *Alaska Packers v. Pillsbury*, 301 U. S. 174, 177; *Christopher et al. v. Braselback*, 302 U. S. 500, 505; see, *KVOS, Inc. v. Ass. Press*, 299 U. S. 38, 279.

<sup>29</sup> *Pope v. Blanton*, 10 F. Supp. 15, 18, dismissed per curiam for lack of requisite jurisdictional amount in controversy, 299 U. S. 521; *Gavica v. Duangh*, 93 Fed. (2d) 173.

<sup>30</sup> *Rogers v. Hennepin County*, 239 U. S. 621. The complaint appears in the original records of this Court, No. 411, Oct. Term 1915. Cf., *Robbins v. Western Auto Ins. Co.*, 4 Fed. (2d) 249, cert. den., 268 U. S. 698; *Woods v. Thompson*, 14 Fed. (2d) 951, and *Illinois Bankers' Life Ass'n v. Farris*, 21 Fed. (2d) 1014, cert. den., 276 U. S. 621.

dividuals have at stake—or of what all the members as a class stand to lose by virtue of the Florida law.

The enjoined State officials have only the duty to prosecute appellees if they continue to fix prices (i. e., to issue licenses) through monopolistic combinations, and these officials have expressly disavowed any intention to do more.<sup>31</sup> Appellees are left free to form such combinations as they please in Florida for the purpose of protecting against copyright infringements. They are here deprived by the Florida statute only of the right to combine to fix prices, and the value of that right must determine the amount in controversy.<sup>32</sup> That right was the object which appellees' bill for injunction sought to protect from allegedly unconstitutional interference.<sup>33</sup> Yet, there is no evidence at all in the record from which even an inference can be drawn as to the amount, if any, individual appellees or other members might lose in Florida by selling or licensing their copyrighted articles individually (which the law permits) instead of fixing prices by monopolistic combination (which the law prohibits). No showing was made that appellees ever have made or ever will make any profit from the operations of the Society in Florida. As stated by the majority opinion, the record discloses that the business of the Society in the entire United States and sixteen foreign countries is a profitable one. But we cannot assume from this that its Florida operations are as a unit profitable. In fact, the record shows only that the entire Society had sixty thousand dollars worth of contracts in Florida in 1936. We are not told what ratable share of this sixty thousand dollars would come to any individual in the division of the entire amount among the forty-five thousand odd members affiliated with the Society (in America and abroad). Each individual member's gross income from Florida might be less than \$1.50 per year.

The loss of a right to an annual gross income of \$1.50 cannot amount to the loss of a right valued at ten thousand dollars—as appellees allege—on the theory that it would cost ten thousand dollars to collect the \$1.50 income individually. And it is, of course, possible that if the Society in fact has no net income from Florida but operates there at a loss, each member's ratable share of income from the Society will actually be increased when the unprofitable Florida

<sup>31</sup> Cf., *Carroll v. Greenwich Ins. Co.*, *supra*, 412.

<sup>32</sup> *Scott v. Donald*, 165 U. S. 107, 114, 115.

<sup>33</sup> Cf., *Glenwood Lt. Co. v. Mutual Lt. Co.*, 239 U. S. 131, 125, 126; *VOS, Inc. v. Ass. Press*, 299 U. S. 269, 277.

operations cease because of the statute. Measuring the amount in controversy on the above theory, jurisdiction might be obtained by a Federal court to enforce rights of a value far less than the jurisdictional \$3,000 required by Congress. For illustration, a statute might prohibit parking of automobiles on certain city streets; an automobile owner assailing the law might be admitted to the jurisdiction of the Federal court by alleging that it would cost him more than three thousand dollars to purchase a parking lot in which to park off the streets of the prohibited area. He would thus "comply" with the statute and abandon the streets in obedience to it.<sup>34</sup> I do not believe that jurisdiction of a Federal court can be rested on measurements of the imagined cost of what a complainant conceivably could, but certainly would never do as an alternative to action forbidden by statute.

The statutory monetary standard is precise and the amount in controversy therefore cannot be conjectural. "It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

"Accordingly this Court has uniformly been strict to adhere to and enforce it."<sup>35</sup>

Without proof of the amount each appellee or member has in issue, how can the "aggregate amount" be fixed at any figure?

Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.<sup>36</sup> "The policy of the statute calls for its strict construction."<sup>37</sup> Since no individual complainant has established that he has the statutory jurisdictional amount in controversy, to rest jurisdiction of a Federal court on no more than the unified desire of

<sup>34</sup> "Cost of compliance" with an assailed legislative act may be considered the measure of the amount in controversy when a right of complainant is regulated, or where he is required to take affirmative action. Cf., *Kroger Gro. Co. v. Lutz*, 299 U. S. 300, 301; *McNutt v. Gen. Motors Etc. Corp.*, 298 U. S. 178, 181. But appellees have not been required to take any affirmative steps, nor are they permitted to fix prices on condition that they "comply" with regulations. The fixing of prices through combinations has been prohibited. Obviously, appellees cannot be prohibited from doing that which they may also do by "complying" with the statute.

<sup>35</sup> *Elgin v. Marshall*, 106 U. S. 578, 581.

<sup>36</sup> See *Healy v. Ratta*, 323 U. S. 263, 270.

<sup>37</sup> *Id.*

many complainants to violate a State statute prohibiting monopolistic price fixing, does constitute a "novel, if not unique," and "grave" judicial departure from the jurisdictional requirement fixed by Congress.

*Third.* The otherwise complete suspension of Florida's law was limited only by the condition that appellees make bond of five thousand dollars payable to the Attorney General of Florida and the District Attorneys of the State. Manifestly, these officials have no individual interest in the monopoly prohibited by the Florida law. The major injuries accruing from the suspension of the law will not be inflicted upon them, but upon the people of Florida who are required to pay monopoly prices while the law remains enjoined. Thus, while the law is suspended, these non-resident appellees can carry on a monopolistic business in Florida contrary to its prohibitions, and the people of Florida who must pay monopoly prices are granted no protection. We have recently declared the governing principal that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interest the injunction may affect."<sup>38</sup> The injunction here was not granted upon conditions that would protect the interests of all who might be affected by it. It neither ordered the monopoly tribute exacted by appellees to be paid into court during suspension of the Florida statute, nor required a bond for the benefit of, and adequate to indemnify those who must pay this tribute until the court permits the statute to go into effect.

Nevertheless, this Court now refuses to correct the grossly unjust failure to protect those who may suffer irreparable injury from the suspension of the Florida law on the ground that "No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court." However, the lower court has already exercised its control resulting in manifestly injurious error apparent on the record.<sup>39</sup> And as "upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper."<sup>40</sup>

<sup>38</sup> *Inland Steel Co. v. United States*, decided January 30, 1939, — U. S. — p. —.

<sup>39</sup> See, *Lamb v. Cramer*, 285 U. S. 217, 222; *United States v. Tennessee & Coosa R'd*, 176 U. S. 242, 256; *Revised Rules of the Supreme Court of the United States*, 27, paragraph 6; cf., *Mahler v. Eby*, 264 U. S. 32, 45.

<sup>40</sup> *United States v. Rio Grande Irrigation Co.*, 184 U. S. 416, 423; *Cincinnati v. Cincinnati & H. Trac. Co.*, *supra*, 454; *Ridings v. Johnson*, 128 U. S. 212, 218; cf., *Patterson v. Alabama*, 294 U. S. 600, 607.



Litigation is not a game in which justice can be awarded only to the alert and fastidious objector, particularly when—as here—a court suspends statutory rights of members of the public who, not being in court, have no opportunity to object. The injustice to the public apparent on this record violates the rudimentary principles of equity and fair play. We should neither condone nor permit it.

They who attack the constitutionality of a law, obtain its judicial suspension, and then continue to violate its terms, should not benefit by the suspension, in the event the law is later held constitutional. Otherwise, a judicially granted period of immunity will reward litigants who unsuccessfully assail the constitutionality of legislation. Seemingly, the time has arrived when despite our constitutional system of government no State law can become effective until a Federal court hears evidence on its constitutionality. The courts—responsible for this fundamental change—should at least protect citizens of an enacting State from disobedience to a State law permitted by an erroneous or improvident interlocutory injunction.

The interlocutory injunction should be vacated.